Three Views of a Secret: Missed Opportunities in the ECHR’s Recent Case-Law on International Commercial Arbitration

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Abstract

The recent judgment of the European Court of Human Rights (ECtHR) in Beg v. Italy has addressed the question of the applicability of the right to fair trial, as defined in Article 6 of the European Convention on Human Rights (ECHR), to arbitral proceedings. The judgment has clarified that the scope of Article 6 ECHR extends to international commercial arbitration. However, a number of questions remain unanswered, especially about the relationship between arbitral tribunals and domestic courts, the significance of fair trial in voluntary proceedings, whether a State is responsible to monitor the respect of due process in arbitral proceedings conducted within its territory and to what extent. Moreover, the ECtHR failed, notwithstanding its foray into the field of arbitration, to clarify the meaning of “impartiality” and “independence” as requirements to sit in arbitral tribunals within the context of Article 6 ECHR. This article provides an analysis of the judgment in Beg v. Italy and highlights, in light of the questionable approach taken by the ECtHR in the case, the uncertainty that affects the scope of application of Article 6 ECHR with regard to arbitral proceedings.

Keywords

arbitration – human rights – due process – impartiality – independence
1 Introduction*

Although impartiality and independence are core topics in the practice as well as the teaching of international commercial arbitration, both the case-law and the literature on this fundamental quality of arbitrators remain relatively scarce.¹ This is even more surprising should one consider arbitration in light of its growth in popularity in recent years.² Indeed, international commercial

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¹ This article is the result of joint efforts and discussions of the authors who wrote together Section IV. Professor Francesco Seatzu is responsible for the Introduction and Section III. Dr. Paolo Vargiu is responsible for Sections II, V, and the Final Conclusions.

² See by way of example International Chamber of Commerce (icc), “icc Announces Record 2020 Caseloads in Arbitration and adr”, 12 January 2021, available at: https://iccwbo.org/media-wall/news-speeches/icc-announces-record-2020-caseloads-in-arbitration-and-adr/ (last visited 3 October 2021); see also KAPLAN, PRYLES, BAO (eds.), International Arbitration:
arbitration has progressively surged in popularity: the number of arbitrators has increased, and so has the range of international commercial arbitration centres or institutions addressing specific substantive areas of international trade and investment law. In a nutshell, arbitration is undoubtedly a mainstream mechanism for the settlement of international commercial and investment disputes.

Contemporary international commercial arbitral institutions are quite heterogeneous in their structure, institutional mandates, and internal organization. Arbitral proceedings are subject to different terms and conditions of

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3 See generally Kalicki, Abdel Raouf (eds.), Evolution and adaptation: the future of international arbitration, Alphen aan den Rijn, 2020; Schwebel, Sobota, Manton, International Arbitration – Three Salient Problems, Cambridge, 2020; Onyema (ed.), The Transformation of Arbitration in Africa: the Role of Arbitral Institutions, Alphen aan den Rijn, 2016; Kun, “Expansion of Arbitral Subject Matter: New Topics and New Areas of Law”, in Brekoulakis, Lew, Mistelis (eds.), The Evolution and Future of International Arbitration, Alphen aan den Rijn, 2016, p. 295 ff.; Del Duca, Rule, Loeb, “Facilitating Expansion of Cross-Border E-Commerce - Developing a Global Online Dispute Resolution System”, Penn State Journal of Law & International Affairs, 2012, p. 59 ff. A detailed, although not exhaustive, list of arbitral institutions and arbitration courts is available at: https://www.international-arbitration-attorney.com/arbitral-institutions-and-arbitration-courts/.

4 See generally Dezalay, Garth, “Constructing a Transatlantic Marketplace of Disputes on the Symbolic Foundations of International Justice”, in Mallard, Sgard (eds.), Contractual Knowledge - One Hundred Years of Legal Experimentation in Global Markets, Cambridge, 2016, p. 185 ff.; Salvi, “L’Arbitrato Istituzionale – Il Modello della Camera Arbitrale di Milano”, Revista Brasileira de Arbitragem, 2009, p. 125 ff.; Ortolani, “The Role of Arbitration Institutions in China”, Transnational Dispute Management, 2013, p. 1 ff.; Magnusson, Ragnwaldh, Wallin, International Arbitration in Sweden. A Practitioner’s Guide, Alphen aan den Rijn, 2021; Davydenko, “Transnational Dispute Settlement at the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry”, in Asseva, Górska (eds.), The Law and Policy of New Eurasian Regionalization: Economic Integration, Trade, and Investment in the Post-Soviet and Greater Eurasian Space, Den Haag, 2021, p. 177 ff.; Rysal, Cevik, “Which Arbitration Institution is the Right Choice for you?”; International Arbitration Law Review, 2020, p. 139 ff.; Silva Romero, “Le Règlement d’Arbitrage de la Chambre de Commerce Internationale (cci) de 2021”, Revue de l’Arbitrage, 2020, p. 949 ff.; McCasey, “International Arbitral Institutions”, in Baetens (ed.), Legitimacy of Unseen Actors in International Adjudication, Cambridge, 2019, p.
services and means of appointment of arbitrators, yet they share a common aspect insofar as they play a strategic role in applying international commercial law and investment law. Impartiality and independence are recognized to be two indispensable factors in maintaining the legitimacy and credibility of international commercial arbitrators, and this is true notwithstanding the fact that international commercial arbitration is often—and largely correctly—described as a “private” dispute settlement mechanism. In this article, we highlight certain questions and issues relating to the impartiality and independence of international commercial arbitrators as these have been analyzed—and, in our view, unsatisfactorily settled—in a recent decision of 20

5 Potestà, “Appointment of Arbitrators in the Changing ISDS Landscape”, Swiss Review of International and European Law, 2021, p. 231 ff.; Berg, “Appointment of Arbitrators: The Norwegian Approach”, Scandinavian Studies in Law, 2017, p. 13 ff.; Oswal, “Appointment of Arbitrators in India”, International Arbitration Law Review, 2017, p. 199 ff.; Petsche, “Access to Justice in Arbitration-Related Proceedings, Access to Domestic Courts for the Appointment of Arbitrators: Problems arising from Parties’ Failure to specify Arbitral Seat in the Arbitration Agreement”, Croatian Arbitration Yearbook, 2016, p. 131 ff.; Moens, Luttrell, “The Appointment and Challenge of Arbitrators Under the Rules of the Australian Centre for International Commercial Arbitration”, International Arbitration Law Review, 2009, p. 84 ff.; Nakamura, “Appointment of Arbitrators According to the UNCITRAL Model Law on International Commercial Arbitration”, International Arbitration Law Review, 2005, p. 179 ff.; Newmark, Hill, “The Appointment of Arbitrators in international Arbitration”, International Arbitration Law Review, 2004, p. 73 ff.; Aksemi, “Appointment of Arbitrators as Specified in the Agreement to Arbitrate”, Journal of International Arbitration, 2003, p. 247 ff.; Hascher, “ICC Practice in Relation to the Appointment, Confirmation, Challenge and Replacement of Arbitrators”, ICC Bulletin, 1995, p. 4 ff.

6 Pauwelyn, “The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus”, American Journal of International Law, 2015, p. 761 ff.; Kidane, The Culture of International Arbitration, Oxford, 2017; Stone Sweet, Grisel, The Evolution of International Arbitration: Judicialization, Governance, Legitimacy, Oxford, 2017; Warwas, The Liability of Arbitral Institutions: Legitimacy Challenges and Functional Responses, Heidelberg, 2017; Fernández Arroyo, “The Legitimacy and Public Accountability of Global Litigation: The Particular Case of Transnational Arbitration”, in Micklitz, Wechsler, The Transformation of Enforcement - European Economic Law in a Global Perspective, Oxford, 2004, p. 355 ff.; van den Berg (ed.), Legitimacy: Myths, Realities, Challenges, Alphen aan den Rijn, 2015; Carboneau, “At the Crossroads of Legitimacy and Arbitral Autonomy”, American Review of International Arbitration, 2005, p. 213 ff.

7 See ex multis Gaillard, “Dialogue des Ordres Juridiques: Ordre Juridique Arbitral et Ordres Juridiques Étatiques”, Revue de l’Arbitrage, 2018, p. 493 ff.; Id., “The consolidation of arbitral proceedings and court proceedings” The ICC International Court of Arbitration Bulletin, 2003, p. 35, also recalling that the differences between court proceedings and arbitral proceedings are significant from both a procedural and a substantial perspective, and equating the role of arbitrators to that of judges is not as straightforward as it may look at first glance.
May 2021 by the Grand Chamber of the European Court of Human Rights (hereinafter referred to as “ECtHR”) on the right to fair hearing under Article 6 of the European Convention on Human Rights (hereinafter “ECHR” or “the Convention”).

2 Beg v. Italy: the Facts

As stated beforehand, on the 20th of May, 2021, the ECtHR issued its long-awaited judgment on the case between Beg S.P.A., an Italian company operating in the sector of the construction and management of hydroelectric power plants and the installation of renewable energy plants, and the State of Italy.

The case was based on an arbitral dispute started in 2000 between ENELPOWER, a company that had spun off from (but was still owned by) ENEL, at that time the Italian State power company. The arbitration, in accordance with the compromis between the parties, was managed by the Arbitration Chamber of the Rome Chamber of Commerce (hereinafter “ACR”), and was filed by Beg seeking termination of the agreement in place with ENELPOWER and damages in the region of € 130,000,000. As their party-appointed arbitrator, ENELPOWER picked a rather famous lawyer and academic who, at the time, was also representing ENEL in a civil dispute. The outcome of the case is somehow debated: according to Italy, ACR intended to dismiss Beg’s claims but the arbitrator appointed by the claimant refused to sign the award; according to Beg, no decision had been reached and, therefore, their party-appointed arbitrator had not expressed any intention to not sign the award. In any case, Beg had become aware of the fact that the arbitrator appointed by ENELPOWER had also been acting as counsel for ENEL; the award was issued by ACR on 25 November 2002, and the tribunal found in favour of ENELPOWER, dismissing the complaints of the arbitrator appointed by Beg and their demand to have the arbitrator appointed by ENELPOWER disqualified. Applications to have the said arbitrator removed from the panel had also been rejected twice by the Tribunal of Rome. Beg lodged claims against ACR before the Tribunal of Rome for negligence, but such claims were dismissed on grounds of ACR being responsible neither for an arbitrator’s failure to declare their conflict of interest, nor for their failure to require an explicit negative disclosure, since no such obligation could be found in the applicable rules of procedure. Also, attempts

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8 ECtHR, Beg S.p.A. v. Italy, Application No. 5312/11, Judgment of 20 May 2021.
9 Ibid., paras. 5–12.
10 Ibid., para. 20.
by Beg to have the award set aside by the Rome Court of Appeal and the Court of Cassation in Italy were unsuccessful: in particular, the Court of Cassation held that a mere suspicion of a conflict of interest was not sufficient to have the award set aside, and that the applicant had the burden of proving that the link between the arbitrator and the other party to the arbitration consisted in an “alignment of interests”.

The case before the ECtHR was quite significant due to the expression of different – and to a certain extent clashing – views on the concepts of arbitration, impartiality and fair hearing. Indeed, while Italy argued that the parties voluntarily waived some of their rights under the ECHR by means of the arbitration agreement, the Court stated that Article 6 of the Convention is to be interpreted as giving everyone the right to have any claim arising out of their rights and obligations heard by an independent and impartial court or tribunal. The Court also argued that, even though the parties had indeed volunteered to take the dispute to arbitration, the said parties could not be considered as having signed a blanket waiver to their rights to an impartial and independent tribunal – especially not before knowing the identity of the members of the tribunal. In particular, Italy submitted that none of the appointed arbitrators had expressly declared the absence of conflicts of interest, nor Beg had presented any objection on this point. Furthermore, Italy underscored that the arbitrator appointed by ENELPOWER was a leading practitioner in the same industry sector of the claimant; therefore, Beg could not have been unaware of the relationship between ENELPOWER and the appointed arbitrator. The Court, however, denied to equate the fact that Beg did not raise the lack of “explicit negative disclosure” by the appointed arbitrators to an implied waiver of the right to appoint an independent and impartial tribunal under Article 6, as an informed party would presume the absence of such a declaration only entails the absence of any conflict of interest does not exist. Furthermore, the Court rejected the argument that Beg could not have been unaware of the relationship between the respondent and its appointed arbitrator as it was not based on any concrete evidence. The only evidence presented to the Court was that of the link between ENELPOWER and the arbitrator, a link strengthened by the fact that the arbitrator had previously been vice-chairman and member of

11 Ibid., paras. 13–28.
12 Ibid., para. 118.
13 Ibid., para. 143.
14 Ibid., paras. 149–150.
15 Ibid., paras. 119–123.
16 Ibid., paras. 142–145.
the board of ENELPOWER’s parent company, thus justifying Beg’s concerns on their impartiality rather than dissipating them.

Moreover, the Court underscored that the impartiality (or lack thereof) of an adjudicator must be determined according to a two-tier test. The test is made of a subjective part – that is, the verification of the impartiality or personal bias of the judge or arbitrator in the case based on their behavior – and an objective one, aimed at checking the composition of the tribunal to establish whether such composition provides the parties with sufficient guarantees to exclude any legitimate doubt as to its impartiality.17 In the present case, the Court found no evidence that the behaviour of the arbitrator in question casted doubts on their impartiality; however, the objective part of the test could not be passed by the tribunal due to the aforementioned links between one of the parties and the arbitrator they had appointed. In light of these considerations, the ECtHR found that Italy, by having its courts reject Beg’s multiple requests to set aside the award because of the objective lack of independence of the arbitral tribunal, had violated Article 6 of the Convention.18

3 Article 6 of the echr and the Application of the Right to a Fair Hearing to Arbitral Proceedings

The applicability of Article 6 of the echr to arbitral proceedings is not as straightforward as it may seem at first glance.19 On one hand, applying Article

17 Ibid., paras. 143–152.
18 Ibid., paras. 153–154.
19 See generally Nino, “Il Rapporto tra Arbitrato e Diritto al Giusto Processo nella Convenzione Europea dei Diritti dell’Uomo: Quali Risultati e Quali Prospettive?”, Ordine Internazionale e Diritti Umani, 2019, p. 756 ff.; Knigge, Ribbers, “Waiver of the Right to Set-Aside Proceedings in Light of Article 6 echr: Party-Autonomy on Top?”, Journal of International Arbitration, 2017, p. 775 ff.; Leandro, “Arbitration, Multi-tier Waiver of the Access to Courts and the European Convention on Human Rights: Some Remarks on the Tabbane Decision”, in Triggiani et al. (eds.), Dialoghi con Ugo Villani, Bari, 2017, p. 321 ff.; de Ly, “Arbitration and the European Convention on Human Rights”, in Levy, Derains (eds.), Liber Amicorum en l’Honneur de Serge Lazareff, Paris, 2011, p. 181 ff.; Krausz, “Waiver of Appeal to the Swiss Federal Tribunal: Recent Evolution of the Case Law and Compatibility with echr, Article 6”, Journal of International Arbitration, 2011, p. 137 ff.; Besson, “Arbitration and Human Rights”, ASA Bulletin, 2006, p. 395 ff.; Hodge, “The Relevance of Article 6 of the European Convention on Human Rights in the Context of Arbitration Proceedings”, International Arbitration Law Review, 2007, p. 163 ff.; Jaksic, “Procedural Guarantees of Human Rights in Arbitration Proceedings: a Still Unsettled Problem?”, Journal of International Arbitration, 2007, p. 159 ff.; Boucobza, Serinet, “Les Principes du Procès Équitable dans l’Arbitrage
6 of the Convention to arbitration appears almost unavoidable because of the proximity of the role of arbitrators to that of judges. Given that arbitrators perform duties and tasks comparable to those of judges in courts and tribunals, it may seem easy to conclude that arbitrators must be subject to the same personal and professional requirements as domestic and international judges.

On the other hand, the reality of things is rather different, much more complex and less straightforward than that they appear at first sight. This is due to a number of significant reasons. Firstly, the proximity of arbitration to State-mandated court proceedings is to be considered more as a pitfall than as a virtue. Secondly, such proximity is, to a large extent, more apparent than real, as indirectly confirmed by the private and confidential nature of the arbitration proceedings and by its character as a voluntary form of protection of...
rights and legitimate interests.\textsuperscript{22} Thirdly, and finally, because the ECHR neither indicates explicitly nor implicitly that arbitration shall be considered a “trial” under Article 6. Notwithstanding these and other reasons, the ECtHR is nonetheless generally inclined to consider Article 6 of the ECHR applicable to arbitration proceedings. The driving force behind this orientation is evident in the

\textsuperscript{22} Incidentally, one may also recall that fair hearing is not explicitly mentioned in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (hereinafter referred to as the “New York Convention”). See MOULLEM, “International Due Process in Post Award Proceedings: a New York Convention Reading”, Cahiers de l’Arbitrage, 2019, p. 239 ff.; BELTRAME DE MOURA, BECKER, “The Normative Roots of the “Due Process Paranoia” in International Commercial Arbitration and its Impacts on Procedural Efficiency”, Vindobona Journal of International Commercial Law and Arbitration, 2019, p. 171; SHARMA, “Due Process “Paranoia”: Turning Away from Judicial Attitudes and Looking for Answers Within”, Arbitration: the Journal of the Chartered Institute of Arbitrators, 2018, p. 314 ff.; DAVIS, “Due Process and Public Policy: the Fated Overlap Between Articles V(1)(B) and V(2)(B) of the New York Convention”, European International Arbitration Review,
ECtHR case-law, with particular reference to the leading case of Lithgow and others v. United Kingdom, in which the Court held that the term “tribunal” in Article 6(1) is not to be necessarily understood as referring to a classic court of law integrated within the standard judicial machinery of the country, but it may also encompass any adjudicative body of sorts specifically established to deal with a limited number of matters, as long as the guarantees of fair trial are always provided. The ECtHR actually went even further when it claimed that the term “established by law” in Article 6 of the ECHR covers not only the legal basis of the existence of a tribunal, but also its compliance with the specific rules and provisions that govern it.

More recently, in its judgment on Beg v. Italy, the ECtHR reiterated this view and approach, holding that Italy was responsible for a breach of Article 6 due to its courts' repeated failure to act upon the alleged lack of impartiality of one of the arbitrators that issued the arbitral award between the applicant company and ENELPOWER S.P.A. However, the judgment in Beg v. Italy, the critical examination of which this work is largely devoted to, did not indicate how and in which parts and components the right to a fair trial under Article 6 of the ECHR applies to arbitral proceedings. In particular, the Court failed to indicate, and thus missed the opportunity to clarify, whether the two requirements of impartiality and independence under Article 6 of the ECHR also apply to arbitrators.

4 The ECHR’s Application of the Doctrine of Waiver to International Commercial Arbitration and the Question of “Flexibility”

In Beg v. Italy, the ECtHR claimed and insisted on a “flexible” approach, meaning by that a non-integral application of the standards of Article 6(1) to international commercial arbitral proceedings. The argument supporting this claim was the wide autonomy that, unlike in judicial proceedings, parties to

2014, p. 15; Nikiforov, “Interpretation of Article V of the New York Convention by Russian Courts: Due Process, Arbitrability, and Public Policy Grounds for Non-Enforcement”, Journal of International Arbitration, 2008, p. 787 ff.; Reed, Freda, “Narrow Exceptions: a Review of Recent U. S. Precedent Regarding the Due Process and Public Policy Defenses of the New York Convention”, Journal of International Arbitration, 2008, p. 649 ff.

23 ECtHR, Lithgow and others v. The United Kingdom, Applications no. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81, Judgment of 8 July 1986.
24 Ibid., paras. 201–202.
25 Ibid.
26 Beg v. Italy, cit., paras. 126–127.
27 Ibid., paras. 127–128.
arbitral proceedings enjoy in the designation of arbitrators and that would be compromised by a more rigorous application of these standards. However surprising this may appear, the ECtHR did not indicate how such “flexibility” would manifest itself in practice. The question is far from being trivial because it leaves uncertainties on the issues connected to the right to fair trial that may eventually be waived by the parties to the dispute.

A waiver of certain issues and rights pertaining to the realm of fair trial is indeed certainly admissible, but lacking any specific indication by the ECtHR as to which issues and rights are subject to waiver and which ones are to be considered mandatory, both the effectiveness of party autonomy and the right to a fair hearing are at risk of being compromised. On one hand, the proper exercise and enjoyment of any private autonomy requires clarity and predictability as to what such autonomy entails and what its limitations are.

Parties to arbitral disputes are generally aware of the limits of party autonomy – after all, the issue of arbitrability limits the scope of the arbitration agreement from the very beginning – and design their proceedings around such limitations.

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28 See generally AALL, “Waiver of Human Rights: Waiver of Procedural Rights According to ECHR Article 6 (Part III/III)”, Nordic Journal of Human Rights, 2011, p. 206 ff.

29 On the significance of party autonomy in international commercial arbitration see generally CARLEVARIS, “Limits to Party Autonomy and Institutional Rules”, European International Arbitration Review, 2019, p. 1 ff; MARCHISIO, “Procedural Reforms at the Court of Arbitration of the International Chamber of Commerce: how to Ensure that Party Autonomy Will Continue Serving as a Legitimization Tool”, in BAEITENS (ed.), Legitimacy of Unseen Actors in International Adjudication, cit. supra note 5, p. 238 ff; RADICATI DI BROZOLO, “Party Autonomy and the Rules Governing the Merits of the Dispute in Commercial Arbitration”, European International Arbitration Review, 2019, p. 67 ff; FERRARI, ROSENFELD, “Límites a la Autonomía de las Partes en Arbitraje Internacional”, Arbitraje: Revista de Arbitraje Comercial y de Inversiones, 2017, p. 335 ff; BERMANN, “Limits to Party Autonomy in the Composition of the Arbitral Panel”, in FERRARI (ed.), Limits to Party Autonomy in International Commercial Arbitration, Huntington, 2016, p. 83 ff; SCHEMER, “The fate of parties’ agreements on judicial review of awards: a comparative and normative analysis of party-autonomy at the post-award stage”, Arbitration International, 2016, p. 437 ff; CORDERO-MOSS, "Limitations on Party Autonomy in International Commercial Arbitration", RCADI, vol. 372, 2014, p. 129 ff; ATTITANO, L’Enforcement delle Sentenze Arbitrali del Commercio Internazionale: il Principio del Rispetto della Volontà delle Parti, Milano, 2009.

30 WEILER, “Retour sur la liberté de Choix des Parties à l’Épreuve de l’Office de l’Arbitre”, Cahiers de l’Arbitrage, 2018, p. 205 ff; ZUCCONI GALLI FONSECA, RASIA, “‘Parties’ and Arbitrators’ Autonomy in Conduct of Arbitral Proceedings”, in BĚLOHLÁVEK, ROZEHNALOVÁ (eds.), Conduct of Arbitration, The Hague, 2017, p. 91 ff; VEEDER, “Whose Arbitration is it anyway - the Parties’ or the Arbitration Tribunal’s?”, in NEWMAN, HILL (eds.), The Leading Arbitrators’ Guide to International Arbitration, Huntington, 2008, p. 337 ff; CORDERO-MOSS, “Is the Arbitral Tribunal Bound by the Parties’ Factual and Legal Pleadings?”, Stockholm International Arbitration Review, 2006, p. 1 ff.
On the other hand, the right to fair trial entails access to justice, the right to set up a claim and have it heard by an independent and impartial adjudicator, and the principle of equal treatment – all aspects directly related to party autonomy. The parties enjoy the right to set up their proceedings as they see fit, and this is an expression of the right to access to justice, besides party autonomy. Moreover, the parties have the right to be heard by an independent and impartial tribunal: such right to be heard, however, is effectively frustrated by the fact that the requirements of impartiality and independence are not defined as such in the ECtHR’s case-law.

To make things worse, these requirements are also not defined in the most commonly adopted arbitration rules. This is the case, for instance, of the ICC Arbitration Rules, that only requires that the statement submitted by appointed arbitrators “contains no qualification regarding impartiality or independence or that a qualified statement regarding impartiality or independence has not given rise to objections”. This is also the case of the SCC Arbitration Rules, which simply provides that “every arbitrator must be impartial and independent” and that “before being appointed, a prospective arbitrator shall disclose any circumstances that may give rise to justifiable doubts as to the prospective arbitrator’s impartiality or independence.” The LCIA Rules are slightly more explicit than that, as they provide that “all arbitrators shall be and remain at all times impartial and independent of the parties”, that “none shall act in the arbitration as advocate for or authorized representative of any party” and that “no arbitrator shall give advice to any party on the parties’ dispute or the conduct or outcome of the arbitration”. Prospective appointees are also required to submit a declaration stating “whether there are any circumstances currently
known to the candidate which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence and, if so, specifying in full such circumstances in the declaration\(^{35}\); even the LCIA rules, however, treat partiality and lack of independence as a matter of fact rather than law, and stress the importance of perceived bias rather than actual one. Curiously, the arbitration rules of the ACR provide at Article 6 that every arbitrator must be impartial and independent from the parties, but also requires appointees to submit a declaration disclosing “any relationship with the parties or their counsel that may affect their independence and impartiality” and “any personal or economic interest, direct or indirect, relating to the subject of the dispute”.

The findings of the ECtHR in *Beg v. Italy* seem fully consistent with the ACR rules, and indeed the ECtHR did not quite look at the ACR rules in the case, nor did it refer to these rules in defining the notions of impartiality and independence under Article 6 ECHR. Quite the contrary: lacking any more punctual definition (which, may we repeat ourselves, the ECtHR failed to provide), the reference to a flexible definition of impartiality and independence and the variety of provisions on impartiality and independence in the galaxy of institutional and domestic arbitrations rules lead to believe that, amongst the elements of fair trial that can be waived by the parties, the ECtHR also considers the rules on disclosure of actual or potential conflicts of interest.

This argument may raise legitimate questions from a strict human rights perspective but is not that far-fetched, considering the peculiar nature of international commercial arbitrations. While there is no reason to consider arbitration as a renouncement to the safeguards guaranteed by courts proceedings (that is, the independence and impartiality of the adjudicator), arbitral tribunals, as stated beforehand, can hardly be regarded as “established by law” in cases of voluntary arbitrations.\(^{36}\) Arbitral tribunals are neither governed nor regulated according to the rules of the judiciary: not only they are not State organs, but it is questionable whether they could even be considered as legal entities.\(^{37}\) Therefore, it could be perfectly acceptable to consider a sort of “mild” version of Article 6 of the ECHR applicable to arbitration: a version that, while safeguarding the fundamental elements of fair trial, also allows for parties to compromise on certain links between arbitrators, counsel and

\(^{35}\) *Ibid.*, Art. 5(4).

\(^{36}\) See a.o. Trakman, Montgomery, *cit. supra* note 21, p. 421; Gerbay, *cit. supra* note 21, p. 159 ff.; Horvath, *cit. supra* note 21, p. 258.

\(^{37}\) See generally Rau, *The Allocation of Power between Arbitral Tribunals and State Courts*, The Hague, 2018; Drahozal, “Is Arbitration Lawless?”, Loyola of Los Angeles Law Review, 2006, p. 187 ff.
parties should they wish, explicitly or impliedly, to do so. That seemed to be the Court’s approach in *Suovaniemi v. Finland*, in which it was held that the choice of arbitration in lieu of domestic court proceedings does not amount to a waiver of all rights under Article 6 ECHR, and that a waiver of the said rights is valid only insofar as such waiver is “permissible”: that is, only certain elements of the right to fair trial are effectively subject to be waived by the parties. Furthermore, in the assessment of whether a waiver is legally valid, the domestic legal framework on arbitration plays a key role. ECHR member states indeed can exercise a certain discretion as to how much weight to give to the various grounds to set aside an arbitral award.38

The ECtHR, however, remains erratic on all these points, because it adopted a contradictory approach in *Beg v. Italy*: even though the Court treated arbitration as a dispute settlement mechanism separated from the courts (thus admitting a certain “flexibility” in the application of Article 6), it has nonetheless established a rather strong link between arbitral proceedings and the seat of arbitration – sufficiently strong to give rise to State responsibility should the State not apply the same requirements itself is subject to under Article 6 ECHR to the arbitral proceedings taking place within its jurisdiction.39 Therefore, a crucial question remains unresolved as to how, and according to which criteria and rules, the impartiality and independence of international commercial arbitrators should be determined from the perspective of compliance with Article 6 ECHR. The choice to underscore such flexibility in theory, only to deny it in practice in the same case, is in our view a second missed opportunity by the Court in its aforementioned judgment on *Beg v. Italy*.

### 5 A Duty to Enforce Article 6 ECHR?

As stated beforehand, the approach of the ECtHR in *Beg v. Italy* has been two-fold: on one hand, the Court admitted that, in proceedings that may be legal but are not judicial such as arbitration, the content of the right to a fair hearing can be construed with a certain degree of flexibility; on the other, it has considered a State in violation of their obligations under the ECHR because of their failure to monitor first, and quash later, an arbitral proceedings run by a tribunal the constitution of which was not in accordance of Article 6 of the ECHR. This, however, is a third opportunity missed by the Court – namely,

38 ECtHR, *Osmo Suovaniemi and others v. Finland*, Application No. 31737/96, Decision on Inadmissibility of 23 February 1999.
39 *Beg v. Italy*, cit., paras 162–165.
clarifying when, and to what extent, a State is liable for the actions of a private entity adjudicating a private dispute on the basis of the agreement between two subjects of private law.

The first question concerns which State would be liable for such a violation. The question is all but moot: because of the delocalized nature of arbitration (mostly accepted even by the most fervid supporters of the seat theory), the seat of the arbitration, the State in which hearings are conducted and the State where the institution managing the arbitration is located may be different. Private international law principles point to the State with the closest connection with the relevant activities, namely the seat of arbitration chosen by the parties or defined in accordance with the applicable procedural rules. The State of the seat, therefore, would be under an obligation to ensure that procedural rules chosen by parties to arbitral disputes are consistent with the ECHR and intervene in case the chosen rules do not guarantee the procedural safeguards provided for by Article 6. The issue caused by the confidential nature of arbitral proceedings, which would hide from the State’s monitoring powers a number of pending arbitration, could be easily solved by the fact that the State’s control could be triggered by one of the parties, and that such control could in any case be exercised by the courts of enforcement. Regardless of whether or not the place of enforcement is also the seat of the arbitration, there would be a domestic court capable to raise the issue of State responsibility for violation of the right to fair trial by an arbitral tribunal or an arbitral institution. Moreover, it can be submitted that, since the right to fair trial is a pillar of the European public policy, setting aside an award that contravenes

40 Bělohlávek, “Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth”, asa Bulletin, 2013, p. 262 ff.; Mistelis, “Delocalization and its Relevance in Post-Award Review”, in Bachand, Gelinas (eds.), The UNCITRAL Model Law After Twenty-Five Years: Global Perspectives on International Commercial Arbitration, Huntington, 2013, p. 167 ff.; Brazil-David, “Harmonization and Delocalization of International Commercial Arbitration”, Journal of International Arbitration, 2011, p. 445 ff.; Read, “Delocalization of International Commercial Arbitration: its Relevance in the New Millennium”, American Review of International Arbitration, 1999, p. 177 ff.; Theofrastous, “International Commercial Arbitration in Europe: Subsidiarity and Supremacy provided in Light of the De-localization Debate”, Case Western Reserve Journal of International Law, 1999, p. 455 ff., p. 471.

41 See generally Hayward, Conflict of Laws and Arbitral Discretion: the Closest Connection Test, Oxford, 2017.

42 Mosconi, “Jurisdiction, Fair Trial and Public Policy: the Krombach and Gambazzi Cases”, in Boschiero, Scovazzi, Pitea, Ragni (eds.), International Courts and the Development of International Law – Essays in Honour of Tullio Treves, The Hague, 2013, p. 863 ff.; Beaumont, Johnston, “Can Exequatur be Abolished in Brussels I Whilst Retaining a Public Policy
with such public policy is an obligation, rather than a mere possibility, for the courts of enforcement.

Even in light of these considerations, to claim that a State be responsible for the acts of a private entity which is neither an official organ of the State nor is vested by the State with a specific power is contrary to the international law on State responsibility.43 It would make no sense, under international law, to consider the seat of arbitration responsible should hearings that take place in other countries (or even online) constitute violations of a human rights treaty; nor it would be more consistent to establish a responsibility upon the State of enforcement for failure to set aside an award rendered in a different country, based on a proceedings that could not have been monitored by the courts of the State of enforcement. Referring the liability to the home State of the managing institution would also be inconsistent with international law: how could one claim the responsibility of, say, France for violations of the right to fair hearing put in place by an arbitral tribunal managed by the ICC (an institution based in Paris but with no ties to the French government) the hearing of which are conducted in a city outside of France?

What is left is the State in which the proceedings are effectively conducted. However, the approach taken by the ECtHR in Beg v. Italy is, once again, not very clear: in particular, it is doubtful whether Italy is responsible as the State of enforcement (that failed to set aside an award rendered by a tribunal not independent under Article 6), or as the seat of arbitration that failed to monitor and rectify an arbitration, taking place within its jurisdiction, run by a tribunal a member of which did not satisfy the requirements of impartiality of the ECHR. Again, the approach to be taken to the interpretation of Article 6 of the ECHR with regard to arbitral proceedings is not the only thing that remains uncertain: the Court has also failed to explain how states are supposed to monitor the commercial arbitral proceedings taking place within its territory. Let us not forget that the first claim by Beg against the arbitrator with strong ties to ENELPOWER was filed on the same day in which the award was issued:44

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43 International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Art. 5 (Conduct of persons or entities exercising elements of governmental authority): “[t]he conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance”.

44 Beg v. Italy, cit., para. 120.
evidently, Italy would have hardly been able to rectify proceedings the flaws of which were not in the knowledge of the allegedly affected party itself. Even though the case-law on State responsibility presents several instances of states been deemed liable under international law for negligence and for omissive acts, to find a State liable for failing to rectify a wrong that was unknown to each of the parties involved would be a rather undesirable first. We submit that, should one configure the possibility of State responsibility for violations of Article 6 ECHR arising out of arbitral disputes or awards, such responsibility can only be imputed to the seat of enforcement. Questions of confidentiality of arbitral proceedings make it unrealistic, for a State, to be capable of actually monitoring the arbitrations taking place in their territory at a given time; one may argue that it would hardly be possible, for a State, to even know how many proceedings are taking place and where. Moreover, were it even possible, we submit that it would not be desirable that a State be able to exercise such a control over arbitral proceedings taking place in their territory. Arbitration is predicated upon party autonomy. The foundations of each proceedings lie in the arbitration agreement, which certifies the intention of the parties to settle their dispute outside of the judicial system of any State; indeed, the sole control by a domestic court is – or ought to be – that of the courts of the seat of enforcement on the arbitral award. As the courts of the seat of arbitration have little, if any, to do with the proceedings leading to the award, it would not be legally justifiable to hold the State of the seat accountable for the conduct of an arbitral tribunal seated in its territory. The ECtHR, however, did not clarify whether Italy was accountable as the seat of the arbitration or the seat of enforcement; while in Beg v. Italy the two seats were identical, the scope of Article 6 ECHR remain uncertain with regard to future cases concerning arbitral proceedings that take place in one State but produce awards to be enforced in another State.

The second question that remains open, as stated beforehand, is to what extent states would be responsible for acts of arbitral tribunals or arbitral institutions within their territory should one admit the existence of such responsibility under international law. Once again, reference should be made

45 See e.g. Popovski, “State Negligence Before and After Natural Disasters as Human Rights Violations”, in Hobson, Bacon, Cameron (eds.), Human Security and Natural Disasters, Abingdon, 2014, p. 94 ff.; Latty, “Actions and Omissions”, in Crawford, Pellet, Olleseon (eds.), The Law of International Responsibility, Oxford, 2010, p. 355 ff.; Bederman, “Contributory Fault and State Responsibility”, Virginia Journal of International Law, 1999, p. 335 ff.; Ohlin, “Complicity, Negligence, and Command Responsibility”, Temple International and Comparative Law Journal, 2021, p. 109 ff.; White, “A Customary International Law of Torts”, Valparaiso University Law Review, 2007, p. 755 ff.
to the international law on the attribution of conduct to a State. The ILC’s Articles on State Responsibility are not a solid ground to establish the responsibility of a State for the acts of an arbitral tribunal, let alone an arbitral institution. Arbitral tribunals and institutions are not State organs, in that they do not exercise any function in the organization of a State, nor are organs of the government. Article 5 of the ILC’s Articles also requires that, for responsibility to arise out of the conduct of a person or entity “exercising elements of governmental authority” requires that the person or entity actually acts in the capacity of a State organ in a particular circumstance.\footnote{See supra, note 43.} That is, however, not the case of arbitral tribunals, which are (both in the case of institutional as well as ad hoc proceedings) essentially private dispute settlement systems, the outcome of which is assessed by a court of enforcement in a fashion similar to that of contracts – that is, in terms of subject matter and formal correctness.\footnote{Penadés Fons, Tent Alonso, “The New York Convention and the Enforcement of Arbitration Agreements by National Courts: What Level of Review?”, in Fach Gómez, López Rodríguez (eds.), \textit{cit. supra note 1}, p. 3 ff.; Pellerin, “Roles et fonctions de la cour d’appel”, Revue de l’Arbitrage, 2018, p. 37 ff.; Zuccconi Galli Fonseca, Rasia, “Arbitral Award and its Review”, in Bélohlávek, Rozehnalova (eds.), \textit{Arbitral Awards and Remedies}, The Hague, 2018, p. 253 ff.; Aimoré Carreteiro, “Appellate Arbitral Rules in International Commercial Arbitration”, Journal of International Arbitration, 2016, p. 185 ff.; Khodykin, “National Court Review of Arbitration Awards: Where Do We Go From Here?”, in Brekoulakis, Lew, Mistelis (eds.), \textit{cit. supra note 3}, p. 269 ff.; Bernardini, “The Scope of Review in Annulment Proceedings”, in Bray, Bray (eds.), \textit{International Arbitration and Public Policy}, Huntington, 2015, p. 167 ff.} All the other instances of State responsibility for acts of persons or entities not directly expression of the State (Articles 8 and 9 of the ILC’s Articles\footnote{Cit. supra note 43. Art. 8 (Conduct directed or controlled by a State) states that “[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct”. Art. 9 (Conduct carried out in the absence or default of the official authorities) provides that “[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority”.} are even less relatable to arbitration, and do not really require to be discussed in detail.

One may rightly argue that the judgment in \textit{Beg v. Italy} is not actually based on the conduct of the arbitral tribunal, but of Italy itself for failing to set aside the improper constitution of the arbitral tribunal, but for the continued failure to
ascertain that the award the enforcement of which was sought in three different degrees of jurisdiction was flawed for the beginning for lack of impartiality. However, such a view does not seem quite convincing. As previously mentioned, the ECtHR has not clarified whether the judgment is in fact based on Italy being the seat of arbitration or the seat of enforcement. Moreover, it was arguable – as Italy did – that the failure to require at least a negative declaration from the arbitrators could be construed as an implied waiver of the right to disclosure; it was also arguable, although less strongly, that the negative disclosure was in any event not needed in light of the fame and recognition of the questioned arbitrator in the industry sector the case was about; and it was also arguable, perhaps decisively, that Italy simply exercised the discretion in defining impartiality and independence in private proceedings that the ECtHR itself recognized to member states in Suovaniemi v. Finland, especially in light of the lack of a shared definition of impartiality and independence at the European level. Lacking such definition, it is arguable that the ECtHR should in fact pay deference to member States’ discretion in defining, or implying, the scope and purpose of the requirements of impartiality and independence, as long as the very basic elements of the right to a fair trial under Article 6 ECHR are fulfilled.

Finally, this lack of a shared definition of impartiality and independence is in fact symptomatic of a wider issue – one that we would like to qualify as a “secret”, three views of which have been unveiled by the decision of the ECtHR in Beg v. Italy: is there really such a thing as a European concept of arbitration? And, if not, should the ECtHR even assess the conduct of arbitral tribunals and states in light of a questionable definition of impartiality and independence?

The question may sound provocative, but it is in fact a legitimate one. Arbitration is commonly practice, commented, and taught as if it was the one unifying legal aspect of business worldwide: a dispute settlement mechanism detached from national jurisdictions, judicial constraints, judges’ specialization and domestic laws that would look and operate the same regardless of the location of proceedings. This is a beautiful story that is told in many a textbook on international arbitration but, in practice, legal cultures matter and influence the practice of law – including that of arbitration. It is indicative that the only international instrument on arbitration is the aforementioned 1958 New York Convention, which does not contain arbitration rules but only requirements for domestic courts of member states to recognize and enforce foreign arbitral awards. The UNCITRAL Rules on International Commercial Arbitration are widely adopted by parties to arbitral disputes – but so are the ICC, SCC, and 49 Arbitration Rules (United Nations Commission on International Trade Law [UNCITRAL]), UN Doc A/31/98, 31st Session Supp No 17.
LCIA rules and the arbitration rules of a variety of local institutions and chambers of commerce. The UNCITRAL Model Law on International Commercial Arbitration is also a success story, but it is not a binding international convention: as the name suggests, it is merely a model for states to shape their domestic laws upon and, even though it has been widely adopted as a model, most states have applied certain tweaks and modification to adapt it to their domestic legal cultures. Besides the sort of very high-profile disputes that take place in hubs of international commercial arbitration (and upon which most textbooks are based), arbitration remains a rather local phenomenon with a great diversity of national and regional iterations. What these iterations have in common is the philosophy behind arbitration: it is a more or less delocalized dispute settlement mechanism, it is centered upon party autonomy rather than a constitutional concept of justice, and its practice reverts more upon the legal culture of the arbitral tribunal and the parties than the applicable rules or the perceived model of commercial arbitration. Arbitration is a language, but each country—rectius, each legal community—speaks it in their own jargon.

6 Concluding Remarks

From the perspective above, Beg v. Italy appears, as exposed in various sections of this work, as a collection of missed opportunities. A shared legal culture can be built from the top down—that is, through a widely adopted convention—or the other way around, by means of consistent judicial practice. The ECtHR, therefore, had in Beg v. Italy the opportunity to start building this shared culture by clarifying what should be meant for impartiality and independence in international commercial arbitration at the ECtHR level. Instead, it remained in a limbo of not willing to regulate a matter that does not straightforwardly fall within the scope of application of Article 6—that is, legal proceedings outside of national courts—while at the same time adopting a rather broad interpretation of the principles of State responsibility for internationally wrongful acts, and ultimately identifying states as the carriers of the duty to ensure that arbitral proceedings are conducted in a manner consistent with Article 6 ECtHR even though the actual applicability of Article 6 to arbitration remains doubtful.

Moreover, the two-tier test devised to ascertain the lack of impartiality and independence of arbitrators does not seem to take into account the variety

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50 Model Law on International Commercial Arbitration 1985 (United Nations Commission on International Trade Law [UNCITRAL]), UN Doc A/40/17, Annex I.
of legal cultures at play in arbitration. On the one hand, it is required that the conduct of the arbitrator shows an alignment of interests with one of the parties; on the other, the simple perception or potential of bias seems sufficient to flaw the constitution of the tribunal. Unfortunately, this does not take into account the fact that, even in the bigger states of the ECHR system, arbitration remains a niche community in which the inbreeding of arbitrators and counsels is still a frequent occurrence, and the possibility that a practitioner is linked with a company becomes more concrete the smaller the industry sector.

The facts at the basis of Beg v. Italy are not quite an anomaly, but rather an indicator of a certain legal culture, expressed in the composition of the tribunal and upheld by the courts of Rome and the Italian Court of Cassation, that has the same dignity of any other legal culture; and, until a proper European culture of arbitration will be built (possibly thanks to the efforts of institutions such as the ECtHR, should they decide to engage), it would be a mistake to reject domestic approaches to procedural rights when the matter may or may not be in fact subject to the provisions of the ECHR.
