President's Message

Human rights now pervade all areas of the law and it is no surprise that the assertion of human rights is becoming more and more frequent in arbitration and arbitration-related proceedings as well. For good or bad?

Traditionally, parties were deemed to opt out of Article 6 of the European Convention of Human Rights (ECHR) by entering into an arbitration agreement. This obviously required a distinction to be made between voluntary arbitration, where opting out was permissible, and compulsory arbitration, where it was not. Beyond this distinction, the ground looked 'safe'; there was no scope for the introduction of human rights in arbitration. This is changing. Recent cases of the European Court of Human Rights are much less affirmative about the scope of the waiver of Article 6 guarantees:

> 'There is no doubt that a voluntary waiver of court proceedings in favour of arbitration is in principle acceptable from the point of view of Article 6 […]. Even so, such a waiver should not necessarily be considered to amount to a waiver of all the rights under Article 6. As indicated by the cases cited in the previous paragraph, an unequivocal waiver of Convention rights is valid only insofar as such waiver is 'permissible'. Waiver may be permissible with regard to certain rights but not with regard to certain others. A distinction may have to be made even between different rights guaranteed by Article 6.' (Suovaniemi vs. Finland, 23 February 1999).

So what rights can be validly waived? The right to a public hearing certainly, but even in arbitrations with a strong public interest such as investment arbitrations or sports? And what about other rights, for instance the right to an impartial tribunal? And when is a waiver 'unequivocal''?

Upon closer examination, many aspects of arbitration may be affected in some way by human rights considerations: the arbitration agreement and the requirements for consent; the method of selection of the arbitrators; the independence and impartiality of the arbitrators; the composition of the arbitral tribunal at the time of the deliberation; the remedies against the arbitral award and the validity of a waiver of any remedies; and, as shown by a recent decision of the Swiss Supreme Court, the immunity of international organizations (ATF 130 I 312, 2 July 2004). Beyond procedural guarantees,

substantive human rights may also be at stake. For instance, an order for disclosure of documents from third parties may affect their personal rights or the non-enforcement of an award may affect the award creditor's property rights.

In other words, there are many questions to be resolved. What is the present state of the law on all these questions? What should arbitration practitioners be aware of? Or, stated differently, are human rights a threat to orderly and efficient arbitration proceedings or, on the contrary, a tool to improve good governance in arbitration? In order to provide a framework for analyzing some of these questions and offer possible solutions, ASA will devote its next conference, which will take place on 2 September 2005 in Bern, to the topic of human rights in arbitration, with the hope that this discussion makes a useful contribution to the ever-evolving practice of international arbitration.

Geneva, March 2005 Gabrielle Kaufmann-Kohler