

WAIVER OF RIGHT TO CHALLENGE AN INTERNATIONAL ARBITRAL AWARD IS NOT INCOMPATIBLE WITH ECHR: *TABBANE V SWITZERLAND*

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I. Introduction

Parties often agree to include an arbitration clause in their commercial agreements in the expectation that arbitration will allow them to enforce their contractual rights in less time and at less cost than through court litigation, whilst maintaining the dispute and its resolution confidential. Such expectations might be left unsatisfied if the unsuccessful party challenges the award, once it has been rendered, by way of annulment proceedings before the competent court at the seat of the arbitration.

Where the seat of the arbitration is in Switzerland, non-Swiss parties have the possibility of increasing the finality of an international arbitral award by including an express waiver of their right to challenge the award in the arbitration agreement. More specifically, Article 192 of the Swiss Private International Law Act (PILA)¹ provides that:

“(1) If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the grounds listed in Article 190(2).

“(2) If the parties have waived fully the action for annulment against the awards and the awards are to be enforced in Switzerland, the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards applies by analogy.”

Similar provisions exist under a limited number of other national arbitration laws, for example, Article 1718 of the Belgian Judicial Code, Article 1522 of the French Code of Civil Procedure or Section 51 of the Swedish Arbitration Act.

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¹ Chapter 12 (Articles 176-194) of the PILA governs international arbitration proceedings in Switzerland.

In a decision rendered on 1 March 2016 in the case of *Tabbane v Switzerland*,² the European Court of Human Rights (“ECtHR”) confirmed for the first time that such provisions, which allow parties to waive their right to challenge an international arbitral award, are not, as such, incompatible with Article 6(1) of the European Convention on Human Rights (“ECHR”).

II. Factual Background

The backdrop to the *Tabbane v Switzerland* decision is a dispute between the French company Colgate-Palmolive Services SA (“Colgate”), and the late Mr Nouredine Tabbane, a Tunisian businessman, and his three sons. Colgate is a subsidiary of the American consumer products company Colgate-Palmolive Co, which is active in the production, distribution and provision of household, health care and personal products.

In the late 1990s, Colgate decided to launch a new concept for the development of its business in Tunisia. In order to avoid the high custom duties that applied to goods imported into Tunisia, this concept was to be carried out in partnership with a local company manufacturing products similar to its own. In the year 2000, Mr Tabbane, who controlled such a local production company, agreed to enter into an industrial and commercial partnership with Colgate. As part of their partnership, the parties created a holding company, Hysys. Mr Tabbane and his sons held together 49% of the shares of this company, Colgate another 49%, with the remaining 2% being held by one of Colgate’s trustees. Hysys in turn held almost all the shares of a local distribution company, Genese. In addition, the parties entered into four agreements, including a shareholders’ agreement and an option agreement providing Colgate with the option to purchase the Tabbane family’s participation in the holding company Hysys.

The option agreement was governed by New York law and contained an arbitration clause providing that disputes were to be settled by a three-member arbitral tribunal and in accordance with the ICC Rules. The seat of the arbitration was to be determined by the arbitrators. The arbitration clause also provided that: “*The decision of the arbitration shall be final and binding and neither party shall have any right to appeal such decision to any court of law.*”

The relationship between the parties broke down in 2006 when the distribution company Genese terminated a manufacture and supply agreement it had entered into with the local production company controlled by the Tabbane family in 2000. In June 2007, Colgate exercised its option

² ECtHR, *Tabbane v Switzerland* (application n°: 41069/12), 1 March 2016, available at [http://hudoc.echr.coe.int/eng?i=001-161870#{"itemid":\["001-161870"\]}](http://hudoc.echr.coe.int/eng?i=001-161870#{) (consulted on 29 August 2016).

to purchase all the shares held by the Tabbane family in the holding company Hysys, but the Tabbane family refused to transfer their shares.

In 2008, relying on the arbitration clause included in the option agreement, Colgate commenced arbitration against Mr Tabbane and his three sons and requested the transfer of their shares in Hysys. The arbitral tribunal chose Geneva, Switzerland, as the seat of this second arbitration. In its final award rendered in 2011, the tribunal decided in favour of Colgate.

Mr Tabbane applied for the setting aside of this award before the Swiss Supreme Court, which has exclusive jurisdiction to handle annulment requests for all international arbitration proceedings in Switzerland.³

In a decision dated 4 January 2012,⁴ the Supreme Court found the request to set aside the award to be inadmissible on the grounds that the parties had validly waived their right to challenge the award, in accordance with Article 192 PILA.⁵

On 2 July 2012, Mr Tabbane lodged an application with the ECtHR pursuant to Article 34 ECHR. Mr Tabbane died in March 2013, but his widow and three sons pursued the application.

III. Alleged violations of the ECHR invoked in the application

In his application, Mr Tabbane invoked an alleged breach of Article 6(1) ECHR (right of access to a court and right to a fair hearing) and of Article 13 ECHR (right to an effective remedy) on the grounds that he had allegedly been denied access to a court in Switzerland to challenge the arbitration proceedings.

More specifically, he alleged that the Supreme Court's interpretation of the waiver of the right to challenge an award contained in the arbitration clause was unduly restrictive on the basis that the parties had allegedly not intended to exclude all remedies, but merely appeals against the award. Mr Tabbane also claimed that Article 192(1) PILA was not compatible with Article 6(1) ECHR. He also contended that the arbitral tribunal's refusal to grant his request for an expertise constituted a violation of his right to a fair trial pursuant to Article 6(1) ECHR.

³ Article 191 PILA.

⁴ Decision of the Swiss Supreme Court 4A_238/2011, 4 January 2012, ASA Bull. 2/2012, pp. 369-382.

⁵ The Supreme Court had reached the same conclusion in the setting aside proceedings initiated by Mr Tabbane against the award rendered in the first arbitration concerning the shareholders' agreement, which contained a waiver formulated in virtually the same terms as the waiver included in the option agreement. *See*, Decision of the Swiss Supreme Court 4A_486/2010, 21 March 2011, ASA Bull. 2/2012, pp. 365-368.

IV. The Decision of the ECtHR

A. Arbitration as an Exception to the Right of Access to State Courts

In its decision of 1 March 2016,⁶ the ECtHR first recalled that the right of access to a court recognised under Article 6(1) ECHR is not absolute.⁷ It noted that contracting states can limit this right to some extent, provided any such limitation pursues a legitimate aim and the means employed to achieve this aim are not disproportionate.⁸ The limitation must not impair the very essence of an individual's right of access to a court. The ECtHR also recalled that the right of access to a court does not necessarily mean the right of access to a state's domestic courts.⁹

The ECtHR noted that, as a result, parties can waive their right to have their dispute resolved by state courts in favour of arbitration without being in breach of Article 6 ECHR.¹⁰

The ECtHR continued by setting out the distinction between voluntary arbitration and compulsory arbitration (*i.e.* imposed by law).¹¹ In cases of compulsory arbitration, the arbitral tribunal must offer all the guarantees provided under Article 6(1) ECHR. In cases of voluntary arbitration, on the other hand, the parties are free to waive their right to have their disputes heard by the ordinary state courts and submit them to arbitration, in which case they voluntarily waive their right to rely on some of the guarantees provided by the ECHR. Such a waiver is not incompatible with the ECHR provided the parties have freely consented to it, the waiver is lawful and unequivocal. The waiver must, in addition, be attended by minimum safeguards commensurate to its importance.

B. Interpretation of the Waiver of the Right to Challenge the Award Contained in the Arbitration Clause

Turning to the case at hand, the ECtHR applied the above principles to the specific issue of the compatibility of the waiver of the right to challenge the award with Article 6 ECHR. The ECtHR found that Mr Tabbane, exercising his contractual freedom, had expressly and voluntarily entered into an

⁶ ECtHR, *Tabbane v. Switzerland* (application n°. 41069/12), 1 March 2016.

⁷ *Tabbane v. Switzerland*, para. 24.

⁸ *Ibid.*

⁹ *Tabbane v. Switzerland*, para. 25.

¹⁰ *Tabbane v. Switzerland*, para. 25, referring to ECtHR, *Deneer v. Belgium*, 27 February 1980, para. 49.

¹¹ *Tabbane v. Switzerland*, paras. 26-27.

arbitration clause with Colgate.¹² The ECtHR therefore considered that Mr Tabbane had expressly and freely waived his right to benefit from the full guarantees provided by Article 6 ECHR.¹³ The ECtHR noted that there was no evidence that the consent to this clause was given under duress.¹⁴

The ECtHR then examined whether the waiver to the right to challenge the award contained in the arbitration clause was unequivocal. It upheld the Supreme Court's finding that in light of the wording of the clause (“*neither party shall have any right to appeal such decision to any court of law*”), the parties had validly excluded any challenge to the award.¹⁵ The ECtHR found that the waiver had been attended by minimum safeguards commensurate to its importance (*i.e.* the applicant had been able to appoint the arbitrator of its choice, who had consented to Geneva as the seat of the arbitration; in addition, the Supreme Court's decision did not appear to be arbitrary considering that it had heard the applicant's arguments and taken into account all relevant factual and legal issues in a duly reasoned decision).¹⁶

C. Compatibility of Article 192(1) PILA with Article 6(1) ECHR

The ECtHR then turned to the question of whether Article 192(1) PILA is compatible with Article 6(1) ECHR. The ECtHR first recalled that the ECHR does not provide for an *actio popularis* for the interpretation of the Convention rights or allow individuals to complain of statutory provisions of domestic law simply because they consider such provisions to be in breach of the ECHR, without however being directly affected by them.¹⁷

The ECtHR then noted that Article 192 PILA reflected the following policy objectives pursued by the Swiss legislator: increasing the attraction and efficiency of arbitration in Switzerland, by avoiding a double control of the award in challenge and in enforcement proceedings, and reducing the caseload of the Supreme Court.¹⁸

The ECtHR commented that the waiver of the right to challenge the award is not compulsory but is merely a possibility offered to parties with no link to Switzerland to opt out of the recourse to the ordinary state courts that is otherwise available by default.¹⁹ The ECtHR also referred to Article 192(2)

¹² *Tabbane v. Switzerland*, para. 29.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Tabbane v. Switzerland*, para. 30.

¹⁶ *Tabbane v. Switzerland*, para. 31.

¹⁷ *Tabbane v. Switzerland*, para. 32.

¹⁸ *Tabbane v. Switzerland*, para. 33.

¹⁹ *Tabbane v. Switzerland*, para. 34.

PILA which provides that, if parties have waived the right to challenge the award pursuant to Article 192(1) PILA and the award is enforced in Switzerland, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) shall be applied by analogy.²⁰ The ECtHR noted that the effect of Article 192(2) PILA is to give state courts additional control over arbitral tribunals, since the former may exceptionally refuse to enforce an arbitral award on the grounds listed in Article V of the New York Convention.²¹

In light of these considerations, the ECtHR held that the restriction of the right of access to a court contained in Article 192(1) PILA pursued a legitimate aim, namely increasing Switzerland’s attraction as a place for arbitration, by providing for flexible and fast procedures, while respecting the parties’ contractual freedom, and that this restriction was not disproportionate in view of the aims pursued.²² The ECtHR therefore concluded that this restriction had not impaired the essence of Mr Tabbane’s right of access to a court.

D. Arbitral Tribunal’s Refusal to Order the Expertise Requested by the Applicant

Finally, the ECtHR also rejected Mr Tabbane’s allegation that the arbitral tribunal’s refusal to grant his request for an expertise constituted a violation of his right to a fair trial pursuant to Article 6(1) ECHR. The ECtHR recalled that the admissibility and assessment of evidence as such are not governed by the ECHR.²³ It found that the tribunal’s refusal to order the expertise was not unfair in the present case, considering the tribunal’s observations that it would have been sufficient for the expert appointed by Mr Tabbane to analyse the relevant documents produced by Colgate, to which Mr Tabbane had been given access.²⁴

V. Commentary

The principle that the right of access to courts can be waived in favour of arbitration without breaching the ECHR has been affirmed on several occasions by the ECtHR²⁵ and the European Commission of Human

²⁰ *Tabbane v. Switzerland*, para. 35.

²¹ *Ibid.*

²² *Tabbane v. Switzerland*, para. 36.

²³ *Tabbane v. Switzerland*, para. 38.

²⁴ *Tabbane v. Switzerland*, para. 39.

²⁵ See e.g., ECtHR, *Deneer v. Belgium* (application n°. 6903/75), 27 March 1980, para. 49; ECtHR, *Osmo Suonaniemi and Others v. Finland* (application n°. 31737/96), 23 February 1999; ECtHR, *Transado-Transportes Fluviais do Sado S.A. v. Portugal* (application n°. 35943/02), 16 December 2003; ECtHR, *Eiffage S.A. and Others v. Switzerland* (application n°. 1742/05), 15 September 2009; ECtHR, *Suda v. the Czech Republic* (application n°. 1643/06), 28 October 2010.

Rights.²⁶ In the case of *Osmo Suovaniemi and Others v. Finland*, the ECtHR clarified that whilst an agreement to arbitrate may waive certain rights guaranteed by Article 6(1) ECHR, it is not a blanket waiver of all rights protected by that provision.²⁷ However, the exact nature and scope of the rights that the parties are entitled to waive *ex ante* by way of an arbitration agreement still remain unclear.²⁸

The *Tabbane v Switzerland* decision is important as it is the first time the ECtHR examines the compatibility of a waiver of the right to challenge an international arbitral award included in an arbitration agreement with the ECHR.

In determining this issue, the ECtHR applied the criteria it had developed to assess the compatibility of arbitration agreements in general with the ECHR. A waiver to the right to challenge an arbitral award must thus satisfy the following criteria in order to be compatible with the ECHR: (1) the parties must have freely consented to the waiver, (2) the waiver must be lawful and (3) unequivocal. These criteria are broadly in line with the criteria applied by the Swiss Supreme Court when assessing the validity of a waiver under Article 192(1) PILA.

The “free consent” criterion is problematic in the field of sports arbitration, where athletes often have little other choice than to adhere to terms imposed by the sports-related bodies to which they must belong in order to exercise their activity at a professional level and participate in competitions. This was recognised by the Swiss Supreme Court in a 2007 decision rendered in a doping dispute, in which it held that there was no valid waiver within the meaning Article 192(1) PILA as the athlete had no choice but to consent to the arbitration agreement containing the waiver.²⁹ For the same reason, such waivers would not be compatible with Article 6(1) ECHR.³⁰

²⁶ The European Commission of Human Rights used to carry out tasks which, with the entry into force of Protocol N° 11 on 1 November 1998, are now carried out by the ECtHR.

²⁷ The ECtHR thus held that “a waiver should not necessarily be considered to amount to a waiver of all rights under Article 6 ... 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.” ECtHR, *Osmo Suovaniemi and Others v. Finland* (application n°. 31737/96), 23 February 1999.

²⁸ See further, Sébastien Besson, *Arbitration and Human Rights*, ASA Bull. 3/2006, pp. 395-416, 405-406.

²⁹ Decision of the Swiss Supreme Court, BGE 133 III 235 (*Cañas v. ATP Tour*), 22 March 2007, ASA Bull. 3/2007, pp. 592-562, paras. 4.3.2.1-4.3.2.2.

³⁰ See, Nora 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, 2/2011, pp.137-162, 161.

The criterion that the waiver be “unequivocal” is in line with the approach adopted by the Swiss Supreme Court in its decisions on Article 192 PILA. The Supreme Court requires clear language reflecting the parties’ intention to exclude any challenge of the award; implied waivers will not be admitted.³¹ Providing in the arbitration agreement that the arbitral award shall be “final and binding” or wording to a similar effect is not sufficient to constitute a valid waiver.³² This shows that careful drafting is required in order for a waiver of the right to challenge an award to be effective. Although it is not compulsory, it may be prudent to include an express reference to Article 192 PILA if Switzerland is the seat of the arbitration.³³

The ECtHR’s findings that provisions such as Article 192 PILA pursue a legitimate aim and are compatible with the ECHR are a welcome development as they respect party autonomy. This development might prompt legislators from other countries to include similar provisions in their national arbitration laws.³⁴

Finally, as noted above, a waiver pursuant to Article 192 PILA is only valid if neither party has a territorial link to Switzerland. The *Tabbane* decision might provide an incentive for the Swiss legislator to consider afresh whether the scope of Article 192 PILA should not be broader, so as to allow parties to an international arbitration which do have a link to Switzerland to opt out of the recourse to the ordinary state courts. There is indeed no good reason why international arbitration agreements involving a party which has a territorial link to Switzerland should be treated differently than arbitration agreements between parties without any connection to Switzerland. In both cases, the award would be controlled at enforcement stage through the mechanisms of the New York Convention, which also applies by analogy to enforcement proceedings of a domestic award in Switzerland by virtue of Article 192(2) PILA.

³¹ Paolo Michele Patocchi/Cesare Jermini, *Basler Kommentar, Internationales Privatrecht*, Basel 2013, ad Art. 192 PILA, para. 19.

³² For a detailed analysis of the Swiss Supreme Court’s case law on the validity of waivers pursuant to Article 192 PILA, see Domitille Baizeau, *Commentary on Article 12 PILA*, in Manuel Arroyo (Ed.), *Arbitration in Switzerland – The Practitioner’s Guide: Commentary*, 2013, pp. 283-294, 284 *et seq.*

³³ See also, *ibid.*, p. 294.

³⁴ See *e.g.* for a discussion on the possible adoption of a similar provision in the Spanish Arbitration Act: José Ángel Rueda García/Marco Vedovatti, *The European Court of Human Rights endorses the parties’ voluntary waiver of the right to annul an award in the seat of arbitration (apropos Tabbane v. Switzerland)*, Spain Arbitration Review, 2016, pp. 87-103, 101.