The Tabbane Case: What the ECtHR Said and What It Didn't

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I. Introduction

ARBITRATION IS PROGRESSIVELY becoming the primary means for resolving international commercial disputes in today's world. The rationale behind this trend is the desire to avoid proceedings before national courts, which do not provide the advantages of neutrality, confidentiality, technical expertise, and finality that an arbitral award usually guarantees.[1] In this vein, it is a common practice for parties to a commercial contract to agree not only to resolve their disputes before arbitral tribunals, but also to waive in advance their right to appeal against the arbitral awards in a domestic court. Such waivers provide the parties with the choice to settle their disputes definitively at the end of the arbitration proceedings, without having to spend considerable time and money relitigating the dispute before a court.[2]

However, the waiver of the right to have recourse before a national judge raises concerns over the conditions under which such renunciations are valid, and gives rise to a possible violation of the rights enshrined in Article 6 of the European Convention on Human Rights (ECHR).[3] This paper examines these issues in light of the jurisprudence of the Swiss Federal Tribunal as well as the recent case of *Tabbane v Switzerland*, which was adjudicated by the European Court of Human Rights (ECtHR) on 1 March 2016.[4]

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1 M L Moses, *The Principles and Practice of International Commercial Arbitration* (2nd edn, CUP 2012) 3.

2 G J Meijer & R H Hansen, 'Arbitration and financial services' in N Dorn (ed), *Controlling Capital: Public and Private Regulation of Financial Markets* (Routledge 2016) 206.

3 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted in 4 November 1950, entered into force 3 September 1953).

4 *Tabbane v Switzerland* App no 41069/12 (ECtHR, 1 March 2016).

II. The Case Law of the Swiss Federal Tribunal Before the Tabbane Case

While numerous jurisdictions have enacted legislation that permits *ex ante* waivers of the right to appeal against arbitral awards,[5] only two of them have a record of its application: the Russian Federation, in relation only to domestic arbitration proceedings,[6] and Switzerland.[7]

In the international arbitration realm, it is common for companies and business people to prefer Switzerland as the seat of arbitration. This is because of the country's liberal arbitration legislation and, more specifically, the provision of Article 192 of the Swiss Private International Law Act (PILA), which stipulates that "[i]f 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)". Two conditions are established in this Article: both parties must reside outside Switzerland, and the renunciation of their right to appeal must be written and express.

With regard to the condition of the "express" waiver, the Swiss Federal Tribunal has since 1990 adopted a strict interpretation, looking for a clear and outright statement of the parties.[8] As a result, the Tribunal has held invalid waivers which either provided that the arbitral award would be "final"[9] or merely "excluded" appeals to state courts.[10] Interestingly, it was not until 2005 that the Federal Tribunal accepted as valid a waiver which stipulated that "all and any awards or other decisions of the arbitral tribunal … shall be final and binding on the parties who exclude all and any rights of appeal from all and any awards insofar as such exclusions can validly be made".[11] According to the Swiss court, although an explicit reference to the provision of Article 192 in the text of the waiver is

5 See indicatively the domestic law of Belgium (Judicial Code, art 1718), England (Arbitration Act 1996, s 69), Sweden (Arbitration Act 1999, s 51), Tunisia (Tunisian Code of Arbitration 1993, art 78(6)) and Turkey (International Arbitration Law, art 15(A)).

6 See the Russian Federation Law on International Commercial Arbitration, art 34(1).

7 See the Swiss Private International Law Act, art 192.

8 For a detailed overview of the Swiss Tribunal's jurisprudence see N Krausz, 'Waiver of Appeal to the Swiss Federal Tribunal: Recent Evolution of the Case Law and Compatibility with ECHR' (2011) 28 Journal of International Arbitration 137.

9 Swiss Federal Tribunal, 19 December 1990, *S. v K. Ltd and ICC Arbitral Tribunal in Zurich,* ATF 116 II 639.

10 Swiss Federal Tribunal, 2 July 1997, *L. Ltd. v The Foreign Trade Association of the Republic of U* case no 4P.265/1996.

11 Swiss Federal Tribunal, 4 February 2005, *A. v B., C. and UNCITRAL Arbitral Tribunal* case no 4P.236/2004, ATF 131 III 173.

not required, it is necessary that "the express declaration of the parties reveals, indisputably, their intention to waive their right to any challenge of the award".[12] This decision undoubtedly marked a shift in the Tribunal's jurisprudence towards a less restrictive approach to the issue, and this approach has been reaffirmed in numerous recent cases.[13]

However, another condition for the validity of the *ex ante* waivers has emanated from the Tribunal's jurisprudence. Specifically, even an expressly stated intention of the parties to waive the annulment of an award will not suffice, if the consent of one of them was given under any form of duress. This was the ruling of the Federal Tribunal in the case of a contract between a sports federation and a professional athlete, who had no real choice but to sign such a waiver clause.[14] Therefore, even if the formal requirements provided for in Article 192 PILA are met, a waiver clause that has been concluded without the free consent of the parties is invalid.[15]

All in all, through this case-by-case approach of the Swiss Federal Tribunal,[16] it has been established that a waiver can ultimately only be held valid if it is explicit and voluntary. These criteria have been recently reaffirmed by the ECtHR.

III. The Tabbane Case

In the case of *Tabbane v Switzerland*, the ECtHR was called upon for the first time to rule if a waiver of recourse to a court against an arbitral award is compatible with Article 6(1) ECHR, which enshrines the right to a fair trial, including the right

[12] For a review of the Tribunal's judgment see D Baizeau, 'Waiving the right to challenge an arbitral award rendered in Switzerland: caveats and drafting consideration for foreign parties' [2005] International Arbitration Law Review 69.

[13] See, among many, Swiss Federal Tribunal, 6 March 2007, *X S.p.A v Y.* case no 4A_500/2007, ATF 134 III 260, which deemed valid a waiver stipulating that "the parties renounce from now any ordinary or extraordinary appeal against the decision which will be issued", and Swiss Federal Tribunal, 21 March 2011, *X. v Y. SA* case no 4A_486/2010, which considered sufficient the following statement: "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".

[14] Swiss Federal Tribunal, 22 March 2007, *Guillermo Cañas v ATP Tour and Court of Arbitration for Sport (CAS)* case no 4P.172/2006, ATF 133 III 235.

[15] See G Kaufmann-Kohler & A Rigozzi, *International Arbitration: Law and Practice in Switzerland* (OUP 2015) 444–445.

[16] For more decisions of the Swiss Tribunal see the cases cited in L Guglya, 'Waiver of Annulment Action in Arbitration: Progressive Development Globally, Realities in and Perespectives for the Russian Federation (Different Beds – Similar Dreams?)' in A J Bělohlávek & N Rozehnalová (eds), *Czech (& Central European) Yearbook of Arbitration: Party Autonomy versus Autonomy of Arbitrators* (Juris 2012) 94.

of access to a court.[17]

The case concerned a Tunisian businessman, Mr. Tabbane, who had been ordered by an arbitral award to transfer his shares in a holding company to the French company Colgate-Palmolive. The arbitration clause in the agreement between the two parties 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". However, Mr. Tabbane appealed to the Swiss Federal Tribunal to annul the award, submitting, *inter alia*, that the provision of Article 192 PILA is inconsistent with the ECHR.[18]

The Tribunal held that the application was inadmissible, given that the Article 192 PILA requirement of an express statement had been met. It further noted that neither the letter nor the spirit of Article 6(1) ECHR is opposed to renunciations of judicial recourse against an arbitral award.[19]

The case was finally brought before the ECtHR, which settled the dispute. The Court reiterated that the right of access to a court, enshrined in Article 6(1) ECHR, does not necessarily encompass the right to have access to a court of the classic type, integrated within the standard judicial system.[20] Therefore, according to the Court's settled jurisprudence,[21] submitting disputes to arbitration is not incompatible with Article 6(1) ECHR.

Moreover, the ECtHR referred to its well-established distinction between compulsory and voluntary arbitration.[22] Whereas compulsory arbitration must comply with the guarantees provided for in Article 6(1) ECHR,[23] in voluntary arbitration parties are entitled to waive certain rights guaranteed by the ECHR as

[17] The ECtHR has declared that "the right of access [to a court] constitutes an element which is inherent in the right stated by Article 6 para 1", in: *Golder v United Kingdom* App no 4451/70 (ECtHR, 21 February 1975) para 36.

[18] For a summary of the principal facts of the case, see ECtHR Press Release, 'The impossibility of appealing against a verdict issued by the International Court of Arbitration was not in breach of the Convention' (24 March 2016) <http://hudoc.echr.coe.int/eng?i=003-5335030-6651343> accessed 12 February 2017.

[19] Swiss Federal Tribunal, 14 January 2012, *X. v. Z. SA* case no 4A_238/2011.

[20] See the case cited in the *Tabbane* judgment of *Lithgow and others v the United Kingdom* App nos 9006/80, 9262-9266/81, 9313/81, 9405/81 (ECtHR, 8 July 1986) para 201.

[21] See the cases cited in the *Tabbane* judgment of *Suda v Czech Republic* App no 1643/06 (ECtHR, 28 October 2010) para 48; *Deweer v Belgium*, App no 6903/75 (ECtHR, 27 February 1980) para 49.

[22] For the distinction between the compulsory and voluntary arbitration in Switzerland see A Bucher, *Commentaire romand: Loi sur le droit international privé - Convention de Lugano* (Helbing Lichtenhahn Verlag 2011) ch 12 <www.andreasbucher-law.ch/NewFlash/Commentaire-romand.html> accessed 12 February 2017.

[23] See the case cited in the *Tabbane* judgment of *Bramelid and Malmström v Sweden* App nos 8588/79, 8589/79 (ECtHR, 12 October 1989).

long as minimum safeguards are adhered to[24] and the renunciation is freely made, lawful, and unequivocal.[25]

In applying those criteria, the Court noted that the waiver was accompanied by minimum safeguards appropriate to its gravity, since Mr. Tabbane was able to take part in the appointment of the arbitral tribunal. It also found that Mr. Tabbane gave his consent under no form of duress. Lastly, it upheld the Federal Tribunal's finding that the wording of the waiver ("neither party shall have any right to appeal such decision to any court of law") was unequivocal.

On the main issue of the complaint that the provision of PILA is inconsistent with the Convention, the ECtHR declared that it would not rule generally upon the compatibility of a national legislation with the Convention, and moved on to examine whether in the current case the restrictions imposed on Mr. Tabbane's rights served a legitimate aim and were proportionate to this end.[26]

Specifically, the Court observed that the main objective of the Swiss legislation has been the promotion of Switzerland as a venue for arbitration. Hence, the aim of the restrictions was legitimate. Furthermore, given that the parties were not obliged but free to take the opportunity provided by the Swiss legislation to renounce judicial recourse, the restrictions were found to be proportionate. Besides, the Court noted that, in any case, the recognition and enforcement of an arbitral award could be refused by the Swiss courts on the grounds of the New York Convention of 1958 (NYC), which, according to Article 192(2) of the PILA, apply by analogy.[27] Thus, the Court implied that, in employing the proportionality test, it took into account that the arbitral award could still be quashed at the enforcement stage on the grounds of public policy enshrined in Article V(2)(b) NYC.

Interestingly, the Court also addressed a second complaint regarding the refusal of the arbitral tribunal to order an expert in the evidentiary process at the request of Mr. Tabbane. The ECtHR issued that, even if the guarantees of Article 6 ECHR were applicable in the case, this refusal did not constitute a violation of the principle of equality of arms. Mr. Tabbane had sufficient access to the evidentiary documents and requested an additional expert for their examination; thus, he was not put at a substantial disadvantage compared with the Colgate-Palmolive

[24] See the case cited in the *Tabbane* judgment of *Pfeifer and Plankl v Austria* App no 10802/84 (ECtHR, 25 February 1992) para 37.

[25] See the cases cited in the *Tabbane* judgment of *Eiffage SA and Others v Switzerland* App no 1742/05 (ECtHR, 15 September 2009); *Transportes Fluviais do Sado SA v Portugal* App no 35943/02 (ECtHR, 16 December 2003).

[26] For the principle of proportionality in the jurisprudence of the ECtHR see A Mowbray, 'A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights' (2010) 10(2) Human Rights Law Review 289.

[27] See Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959).

company. Therefore, the Court found that both complaints were manifestly ill-founded and declared the application inadmissible.

IV. A Critique of the Decision

The *Tabbane* case was the first time that the Court ruled upon the compatibility of the *ex ante* waiver of the right to challenge an arbitral award before a domestic court with the Convention. To reach its conclusion, the Court applied the criteria for the validity of such waivers, as developed by the Swiss Federal Tribunal[28] and its own previous jurisprudence. Although the conclusion of the ECtHR has been appraised positively,[29] the line of reasoning of its decision and the examination of the second complaint lodged in the same case raise some intriguing considerations.

A. The Line of Reasoning—An Unnecessary Step

The Court found that the agreement of the parties to exclude the annulment of the award was freely made, lawful, and unequivocal, and hence held that Mr. Tabbane validly waived his right of access to justice, pursuant to Article 6(1) ECHR. However, it did not stop its reasoning at this point; rather, it moved on to rule upon whether the restrictions imposed on Mr. Tabbane's right to a fair trial were proportionate to the legitimate aim sought.

Nevertheless, this proportionality test requires foremost that some kind of restriction has, in fact, been imposed by a State on the rights of individuals.[30] *In casu*, the provision of Article 192 PILA establishes no such restriction. As the Court itself observed, the aforementioned article provides individuals with the choice to exclude the annulment of an arbitral award. Essentially, it respects the autonomy of the parties during the arbitration proceedings, giving them the choice to avoid at all the lengthy and costly litigation procedures before national courts.[31] Thus, there was no reason for the Court to employ the proportionality test and examine if a fair balance has been struck between the protection of the individual's right to a fair trial and the requirements of the general interest. If the right of access to

[28] For an overview of the general rules developed by the Federal Tribunal see L Lévy & T Bersheda, 'Recent Swiss Developments on Exclusion Agreements' in D Bray & H L Bray (eds), *International Arbitration and Public Policy* (Juris 2014) 120.

[29] N Voser & A George, 'ECtHR: Waiver of Recourse against International Arbitral Award Not Incompatible with ECHR' (*Kluwer Arbitration Blog*, 31 March 2016) <http://kluwerarbitrationblog.com/2016/03/31/ecthr-waiver-of-recourse-against-international-arbitral-award-not-incompatible-with-echr/> accessed 12 February 2017.

[30] See O J Settem, *Applications of the 'Fair Hearing' Norm in ECHR Article 6(1) to Civil Proceedings: With Special Emphasis on the Balance Between Procedural Safeguards and Efficiency* (Springer 2016) 27ff.

[31] For the core principle of party autonomy in Swiss law see G Kaufmann-Kohler & A Rigozzi (n 15) 84ff.

justice has been waived voluntarily, there is no right that has been restricted.

B. The Second Complaint – An Issue Never Addressed

The second complaint of Mr. Tabbane, alleging the violation of the principle of equality of arms during the arbitration process, gave the Court the unique chance to rule whether and how the guarantees of Article 6 ECHR are applicable in arbitration proceedings.[32] The Court, however, avoided addressing the issue. It declared that even if the arbitral tribunal was obligated to guarantee the rights of the parties under Article 6 ECHR, the equality of arms enshrined therein was not infringed in this case. It thus seemed willing to examine if the guarantees of a fair trial were met in the arbitration proceedings, without clarifying whether the guarantees of Article 6 ECHR were of general applicability to arbitration proceedings. As a result, the question of what the decision of the Court would be if the arbitral award contravened the guarantees of the ECHR still remains.

To give a proper answer, we should start our argumentation by considering that only States, and not private entities such as arbitral tribunals, can be parties to the ECHR and hence be held responsible for its violation.[33] Therefore, the follow-up question that arises is whether Switzerland could be held responsible in this case.

To address this, we should first turn our focus on the specific obligations arising from the ECHR, which could have been infringed in the case at hand. Given that Mr. Tabbane had renounced his right of access to a court, enshrined in Article 6(1) ECHR, it could be argued that Switzerland could not have violated that provision. Nonetheless, an individual's waiver of his right to have recourse to a court does not, without more, mean that he has waived his inalienable right to have a fair hearing, which is also established in Article 6(1).[34] This has been reaffirmed by the jurisprudence of the ECtHR, which has held that "a waiver should not

[32] See S Besson, 'Arbitration and Human Rights' (2006) 24 ASA Bulletin 395, 402, who supports that Article 6 of the ECHR applies directly to arbitrators. For a different approach see A Samuel, 'Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human Rights: An Anglo-Centric View' (2004) 21 Journal of International Arbitration 413, 426, who finds no good reason why the ECHR should play any significant role, as long as basic notions of fairness are respected.

[33] Article 1 of the ECHR provides that it is the States-parties that "shall secure to everyone within their jurisdiction the rights and freedoms".

[34] J C Landrove, 'European Convention on Human Rights' Impact on Consensual Arbitration: An Etat des Lieux of Strasbourg Case Law and of a Problematic Swiss Law Feature' in S Besson et al (eds), *Human Rights at the Center* (Schulthess 2006) 72, 86; M V Benedettelli, 'Human rights as a litigation tool in international arbitration: reflecting on the ECHR experience' [2015] Arbitration International 631, 646–7.

necessarily be considered to amount to a waiver of all the rights under Article 6".[35] Thus, Switzerland was still under an obligation to protect the other guarantees set out in Article 6 ECHR, although the right of access to a court had been waived in the present case. It could do so by enacting a legal framework, which would give the national courts the authority to ensure that the non-waivable guarantees of Article 6 ECHR are respected during the arbitration proceedings.

In this light, notwithstanding that Swiss legislation provides the parties with the choice to exclude the annulment of the award by the state courts, judicial review of the award is still available at the enforcement stage.[36] In fact, as the ECtHR noted,[37] Swiss law stipulates that the enforcement of the arbitral awards can be refused by the state courts on the grounds of international public policy of the NYC.[38] These grounds include, *inter alia*, violations of the safeguards for a fair hearing enshrined in Article 6 ECHR, as widely accepted in the scholarly community.[39] Thus, the Swiss courts would be able to refuse the enforcement of the award, should the right of Mr. Tabbane to a fair hearing were violated in the arbitration proceedings. As a result, Swiss law provides for an adequate form of judicial review of the award at hand within its jurisdiction. Consequently, even if the arbitral award ran counter to the right to a fair hearing, Switzerland would still be in compliance with its ECHR obligations, since its courts had the authority to refuse the enforcement of such an award.[40]

[35] *Osmo Suovaniemi and others v Finland* App no 31737/96 (ECtHR, 23 February 1999).

[36] This consideration is also in line with the European Commission's jurisprudence, which has suggested that the fact that the award has to be recognized by the national courts may entail the responsibility of the state under the ECHR. See *Jakob BOSS Söhne KG v Germany* App no 18479/91 (Commission Decision, 2 December 1991).

[37] This remark was paradoxically made with regards to the first and not the second complaint, to which it truly pertains. See *Tabbane v Switzerland* (n 4) para 35.

[38] Art 192(2) of the Swiss Private International Law Act provides that "[w]here the parties have excluded all setting aside proceedings and where 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".

[39] See S Besson (n 32) 402 and the scholars cited in fn 32; M V Benedettelli (n 34) 657; J C Landrove (n 34) 83; N Krausz (n 8) 157. The European Court of Justice has also stated, with regards to Article 27 of the Brussels Convention of 1968, that the rights established in Article 6 ECHR pertain to international public policy. See Case C-7/98 *Dieter Krombach v André Bamberski* [2000] ECR I-1956, para 44.

[40] It should be duly noted that this would not be the case if an arbitral tribunal denied jurisdiction or dismissed all the claims of the applicant in the arbitration. In that case, the award could not *per se* be enforced and, since there would no enforcement stage, the Swiss courts would not be able to review if the rights of the applicant were violated. It follows that under certain circumstances – *ex ante* waiver of the annulment, *per se* not enforceable award and violation of rights in the arbitration proceedings – Switzerland could be held responsible for a breach of its obligation to protect the rights established in the ECHR. For this probably rare case scenario see also J C Landrove (n 34) 99; N Krauz (n 8) 153.

V. Concluding Remarks

The ECtHR has settled the issue of the compatibility of the waivers to appeal against arbitral awards with Article 6(1) ECHR, declaring that there is no violation of the ECHR so long as the waiver is freely made, lawful, and unequivocal. This decision does not come as a surprise. It is in line with both the previous case law of the ECtHR and the Swiss jurisprudence on the matter. What is important is that, contrary to the approach of the Swiss Federal Tribunal, which rules upon the validity of the waivers on a case-by-case basis, the ECtHR has set out some general criteria governing those renunciations.

Despite the deficiencies in the ECtHR's line of reasoning, which should be reexamined, the decision has provided some vital guidelines on the issue of the free consent to waivers. When the dispute concerns business-to-business relationships, it seems that the question of whether the waiver is freely made or not should *prima facie* be answered in the positive. This is because a fair balance of competing interests is easier to be struck during a contract negotiation between businesses rather than between individuals and organizations such as athletes and sports associations, the latter of which very often impose terms on the former, including waiver clauses.

Lastly, the ECtHR chose not to answer the crucial question of whether or how the guarantees of the ECHR apply in arbitration proceedings. Nevertheless, a closer look at the jurisprudence shows that States are under a concrete obligation to protect the inalienable rights of Article 6(1) ECHR in arbitration proceedings by enacting a legal framework that assures that every arbitral award is reviewed by the state courts, either at the annulment stage or at the enforcement stage.