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ECtHR: Waiver of Recourse Against International Arbitral Award Not Incompatible with ECHR

Nathalie Voser (Schellenberg Wittmer Ltd, Switzerland) and Anya George (Schellenberg Wittmer) · Thursday, March 31st, 2016 · Schellenberg Wittmer

On 1 March 2016, the European Court of Human Rights ("ECtHR" or the "Court") rendered a decision in the case of *Tabbane v. Switzerland* (application no. 41069/12). In that decision, which was published on 24 March 2016, the Court, for the first time, examined the compatibility of a waiver of recourse against an arbitral award with article 6(1) of the European Convention on Human Rights ("ECHR") which guarantees every person's right of access to a court in civil matters.

The Swiss Private International Law Act ("SPILA") allows foreign parties to waive the right to challenge an arbitral award rendered in Switzerland. More particularly, Article 192(1) of the SPILA provides that:

> 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 their right to challenge the award, or they may limit that right to one or several of the grounds for challenge listed in Article 190(2).

A limited number of other national arbitration laws contain similar provisions, for example Section 51 of the Swedish Arbitration Act, Article 1718 of the Belgian Judicial Code and Article 1522 of the French Code of Civil Procedure.

The decision of the Court confirms that such provisions are not, per se, incompatible with the ECHR, as long as parties are free to choose arbitration instead of state courts, and the waiver to challenge the award itself is unequivocal.

Facts

In the late 1990s, the French company Colgate-Palmolive Services SA ("Colgate") decided to cooperate with a Tunisian company to manufacture its products locally. In that context, it entered into an industrial and commercial partnership with Mr Noureddine Tabbane, a Tunisian businessman, and his three sons.

The parties signed various agreements setting out their respective financial and legal obligations, including an agreement that gave Colgate the option to acquire shares held by Mr Tabbane and his sons in "Hysys", a holding company linked to the partnership (the "Option Agreement"). Colgate decided to exercise that option in 2007, but Mr Tabbane and his sons refused to transfer their shares.

The Option Agreement contained an arbitration clause according to which disputes were to be settled by an arbitral tribunal composed of three members, in accordance with the ICC Rules. The seat of the arbitration was to be determined by the arbitrators. The clause also specifically 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.

Colgate initiated arbitration proceedings against Mr Tabbane and his sons in 2008, requesting that they transfer their shares in Hysys. The arbitral tribunal chose Geneva as the seat of arbitration. It rendered its final award in 2011 in favour of Colgate.

Mr Tabbane, who owned nearly all of the shares in Hysys that were to be transferred, petitioned the Swiss Supreme Court to have the award set aside. On 4 January 2012, the Supreme Court, after examining the arbitration clause contained in the Option Agreement, found that the petition was inadmissible as the parties had validly waived the right to challenge the award.

Mr Tabbane lodged an application with the ECtHR on 2 July 2012. He died in March 2013, but his widow and three sons pursued the application.

Decision of the ECtHR

Mr Tabbane's main complaint was that he had been denied access to a court in Switzerland that would have reviewed his challenge to the arbitral award. He alleged that Article 192 of the SPILA, which provides that parties may, in certain circumstances, waive recourse against arbitral awards, was not compatible with Article 6(1) of the ECHR.

Article 6(1) of the ECHR guarantees every person's right of access to a court in civil matters. That right, as the ECtHR pointed out, is not absolute and does not necessarily imply the right to seize a "traditional" state court, i.e. one that is part of the judiciary of a country. As has already been established in previous case law of the ECtHR, submitting disputes to arbitration is not incompatible with article 6(1) of the ECHR.

The Court recalled the distinction between compulsory and voluntary arbitration and its related case law. Whereas compulsory arbitration must comply with the guarantees provided for in Article 6(1) of the ECHR, voluntary arbitration does not fall under that provision. Indeed, parties are entitled to waive certain rights guaranteed by the ECHR to the extent that the waiver is freely made, licit and unequivocal. Provided that those criteria are fulfilled, they may choose to exclude the jurisdiction of state courts and submit their disputes to arbitration.

The ECtHR applied those same criteria to the waiver of recourse against an arbitral award. It found that there was absolutely no indication that Mr Tabbane was under any form of constraint when he entered into the Option Agreement and the arbitration agreement contained therein. Indeed, the applicant himself had never claimed otherwise.

The ECtHR upheld the Swiss Supreme Court's finding that the wording of the waiver of recourse was unequivocal ("*neither party shall have any right to appeal such decision to any court of law*"). It also pointed out that the waiver had been "*surrounded by minimum safeguards appropriate to its gravity*". Mr Tabbane was able to take part in the appointment of the arbitral tribunal and in the arbitration process. His challenge to the award was duly examined by the Swiss Supreme Court, whose judgment was reasoned and gave no appearance of being arbitrary.

The Court then turned to the question of the compatibility of Article 192 of the SPILA with the ECHR. It started by recalling that the ECHR does not provide for an *actio popularis* for the interpretation of the rights set out therein, or permit individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it might contravene the Convention.

The Court recalled that, when adopting that provision, the Swiss lawmakers had two main objectives, namely:
• to reinforce the attractiveness of Switzerland as a venue for international arbitration, by avoiding a dual review of the award, first in setting aside proceedings, then in enforcement proceedings;
• to lighten the caseload of the Supreme Court.

These, according to the ECtHR, are legitimate objectives. Moreover, parties are not obliged to waive their right to challenge the award, but are merely given the choice to do so if they fulfil the requisite criteria. The Court also referred to the second paragraph of Article 192 of the SPILA, which provides that the New York Convention applies by analogy to the enforcement in Switzerland of awards with regard to which the parties have waived recourse to the Swiss Supreme Court. This provision serves to ensure that parties are not entirely precluded from challenging serious irregularities in the arbitration, even if they have waived recourse.

In light of those considerations, the Court held that the restriction of Mr Tabbane's right of access to a court followed a legitimate objective, namely to reinforce the attractiveness of Switzerland as an arbitration hub by allowing for flexible and fast procedures while respecting the applicant's autonomy, and was not disproportionate. The essence of Mr Tabbane's right of access to a court had therefore not been impaired.

Comments

This is the first decision in which the ECtHR examines the compatibility of a waiver of recourse against an arbitral award with the Convention. The application to such a waiver of the criteria developed for arbitration agreements in general, namely that the agreement to arbitrate must be freely made, licit and unequivocal, is both logical and

reasonable.

In this instance, the waiver was clearly voluntary – Mr Tabbane was an experienced businessman and entered freely into the arbitration agreement. There are other scenarios where it may be less clear whether all parties were in fact free to agree or disagree to the certain terms. One area in particular where this is an issue is sports arbitration. It is well recognised that there is an imbalance between athletes and sports-related bodies, which in many cases enables the latter to impose terms on the former. In recognition of that fact, the Swiss Supreme Court, in the well-known Cañas case (Decision of Swiss Supreme Court of 22 March 2007, 133 III 235), has found that athletes are not, in principle, bound by waivers of recourse against awards, even if they satisfy the formal requirements of Article 192 of the SPILA. The Supreme Court's reasoning was that such a waiver cannot be deemed to have been freely made, given the imbalance mentioned above, and, if the waiver were to be deemed valid, there would be no possibility of judicial control over the award, as awards in sports arbitration are enforced by sports-related bodies, not state courts.

The requirement that waivers of recourse be unequivocal is in line with the Swiss Supreme Court's own case law which applies a stringent test to such waivers. Even more so than the agreement to arbitrate, the agreement to exclude any possibility of challenging the award must be explicit and unambiguous, as the resulting restriction to the parties' rights is more pronounced.

This decision may influence the current discussion in Switzerland surrounding the revision of the provisions of the SPILA on international arbitration. There has been some debate as to whether the scope of Article 192 should be deleted or, conversely, extended. At present, Article 192 of the SPILA applies only to foreign parties, as do the corresponding Swedish and Belgian provisions. However, it could be extended to include national (i.e. Swiss) parties, which is the solution adopted in the French Code of Civil Procedure. The decision in *Tabbane v. Switzerland* could provide some arguments in support of such an extension, as it shows that: (i) there are legitimate reasons for such provisions, (ii) party autonomy is and remains the guiding principle in arbitration, and (iii) parties can ultimately only be held to a waiver if it was voluntary and explicit.

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