EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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The impossibility of appealing against a verdict issued by the International Court of Arbitration was not in breach of the Convention

In its decision in the case of **Tabbane v. Switzerland** (application no. 41069/12) the European Court of Human Rights has unanimously declared the application inadmissible. The decision is final.

The case concerns a challenge to a decision settling a dispute before the International Court of Arbitration in Geneva.

The Court noted that Mr Tabbane, in exercise of his contractual freedom, signed an arbitration agreement with the Colgate company, and had expressly and freely waived the possibility of submitting disputes to an ordinary court.

The Court noted that section 192 of the Federal Law on Private International Law, which required that the parties were to agree to waive any appeal against the verdict issued by the arbitration court, reflected a choice of legislative policy corresponding to the Swiss legislature's wish to increase the attractiveness and effectiveness of international arbitration in Switzerland.

The Court held that the restriction on the right of access to a court pursued a legitimate aim, namely the development of Switzerland's position as a venue for arbitration, while respecting Mr Tabbane's contractual freedom, and could not be regarded as disproportionate.

Principal facts

The applicant, Noureddine Tabbane, is a Tunisian national who was born in 1944 and lived in El Menzah (Tunisia). The applicant having died in March 2013, his widow and three sons pursued the application.

Mr Tabbane, a Tunisian businessman, decided to enter into an industrial and commercial partnership with Colgate-Palmolive, a company incorporated under French law which has its registered office in France. To this end, an "option agreement" was signed between the parties, setting out all the financial and legal issues between them. This contract contained an arbitration clause in the event of a dispute.

On 4 August 2008 the company Colgate filed a request for arbitration against Mr Tabbane and his three sons before the International Court of Arbitration at the International Chamber of Commerce (the ICC Court). In keeping with the procedure, each of the parties appointed an arbitrator and the ICC Court appointed the third arbitrator. In accordance with the arbitration clause in the contract of 4 September 2000, it was for the three arbitrators to determine the place in which the arbitration court was to meet. It was decided that this would be Geneva.

During the procedure, Mr Tabbane asked the court of arbitration to appoint a financial expert to carry out an audit of the finances of the companies owed by him, or to let his own financial expert carry out the audit. The court of arbitration dismissed the request, finding that Colgate had already submitted financial evidence prepared by an auditor, and that it was sufficient to grant access to those auditing documents to the expert engaged by Mr Tabbane and his three sons.

On 9 March 2011 the court of arbitration delivered its final verdict and ordered Mr Tabbane and his sons to transfer all their shares to Colgate and to pay costs and the legal fees. Mr Tabbane lodged a civil-law appeal with the Federal Court in order to have that decision set aside. The Federal Court declared his appeal inadmissible on the ground that the parties had validly waived the right to

appeal against any decision issued by the court of arbitration, in accordance with section 192 of the Federal Law on Private International Law.

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 2 July 2012.

Relying on Articles 6 § 1 (right of access to a court and right to a fair hearing) and 13 (right to an effective remedy), Mr Tabbane complained that he had been denied access to a court in Switzerland that would have enabled him to challenge the arbitration procedure. He alleged that section 192 of the Federal Law on Private International Law was not compatible with Article 6 § 1 of the Convention. Lastly, he complained that the court of arbitration's refusal to order an expert report at his request had been in breach of his right to a fair hearing.

The decision was given by a Chamber of seven, composed as follows:

Luis **López Guerra** (Spain), *President*,
Helena **Jäderblom** (Sweden),
Helen **Keller** (Switzerland),
Johannes **Silvis** (the Netherlands),
Dmitry **Dedov** (Russia),
Pere **Pastor Vilanova** (Andorra),
Alena **Poláčková** (Slovakia)*, Judges*,

and also Stephen **Phillips**, *Section Registrar.*

Decision of the Court

Article 6 § 1

The Court noted that Mr Tabbane, in exercise of his contractual freedom, had signed an arbitration agreement with the Colgate company which contained a clause on resolving potential conflicts. In entering into this arbitration agreement, Mr Tabbane had expressly and freely waived the possibility of submitting disputes to an ordinary court. There had been no indication that Mr Tabbane had acted under duress.

In interpreting the parties' wishes, the Federal Tribunal reached the conclusion that they had ruled out any appeal against the arbitration court's verdict. This waiver had been attended by minimum safeguards. Thus, Mr Tabbane had been able to select an arbitrator of his own choosing, who, in concert with the two other arbitrators, had chosen Geneva as the place of arbitration, with the result that the arbitration process was governed by Swiss law. The Court noted that the Federal Tribunal had heard Mr Tabbane, and that it had taken into account all of the objectively relevant factual and legal elements for resolving the dispute. The Federal Tribunal's judgment had been adequately reasoned, with the result that it did not appear arbitrary in any way.

With regard to the question of whether the possibility of waiving an appeal against an arbitration verdict violated Article 6 § 1 of the Convention, the Court reiterated that the Convention did not envisage the bringing of 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 considered, without having been directly affected by it, that it might contravene the Convention. The Court noted that section 192 of the Federal Law on Private International Law, which required that the parties were to agree to waive any appeal against the verdict issued by the arbitration court, reflected a choice of legislative policy corresponding to the Swiss legislature's wish to increase the attractiveness and effectiveness of international arbitration in Switzerland.

The Court concluded that the restriction on the right of access to a court pursued a legitimate aim, namely the development of Switzerland's position as a venue for arbitration, while respecting Mr Tabbane's contractual freedom, and could not be regarded as disproportionate. The very essence of Mr Tabbane's right of access to a court had not been impaired.

It followed that his complaint concerning the denial of access to a court in Switzerland in order to challenge the arbitration procedure was ill-founded and had to be rejected.

With regard to the refusal by the court of arbitration to order an expert report at Mr Tabbane's request, and the Federal Court's refusal to take account of certain of his arguments, the Court emphasised that the court of arbitration had held that Colgate had already submitted financial evidence prepared by an auditor, and that it was enough to provide the auditor privately engaged by Mr Tabbane with access to the same auditing documents as those used by Colgate's expert. Given that Mr Tabbane had had access to the documents in question, it did not appear that he had been placed at a substantial disadvantage vis-à-vis Colgate.

Mr Tabbane's complaint concerning the court of arbitration's refusal to grant his request for a court-ordered expert report was manifestly ill-founded and had to be rejected.

The Court unanimously declared the application inadmissible.

The decision is available only in French.

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