# DIALOGHI
## CON
# UGO VILLANI

## I

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# ARBITRATION, MULTI-TIER WAIVER OF THE ACCESS TO COURTS AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS: SOME REMARKS ON THE *TABBANE* DECISION



**1.** Among the debates on the international protection of human rights – to which Professor Ugo Villani has constantly contributed – that of the interplay between arbitration and the European Convention on Human Rights ("ECHR") is increasing[1].

The decision of the European Court of Human Rights ("European Court") in the *Tabbane* v. *Switzerland* case stimulates interest because it evaluates under Article 6 ECHR whether the waiver of the right to challenge an award before a court is compatible with the right of access to justice[2].

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[1] See *inter alia* FLAUSS, *L'application de l'art. 6 de la Convention européenne des droits de l'hommes aux procédures arbitrales*, in *Gazette du Palais*, 1986, p. 408 ff.; JACOT-GUILLARMOD, *L'arbitrage privé face à l'art. 6, § 1 de la Convention européenne des droits de l'hommes*, in MATSCHER, PETZOLD (eds.), *Protecting Human Rights: the European Dimension: Studies in Honour of Gérard J. Wiarda*, Köln, 1988, p. 281 ff.; JARROSSON, *L'arbitrage et la Convention européenne des droits de l'homme*, in *Revue de l'arbitrage*, 1989, p. 573 ff.; MOITRY, *Right to a Fair Trial and the European Convention on Human Rights – Some Remarks on the République de Guinée Case*, in *Journal of International Arbitration*, 1989, p. 115 ff.; RECCHIA, *Arbitrato e Convenzione europea dei diritti dell'uomo (prospettive metodologiche)*, in *Rivista dell'arbitrato*, 1993, p. 381 ff.; CONSOLO, *L'equo processo arbitrale nel quadro dell'art. 6 par. 1 della Convenzione europea dei diritti dell'uomo*, in *Rivista di diritto civile*, 1994, p. 453 ff.; MOURRE, *Le droit français de l'arbitrage international face à la Convention européenne des droits de l'hommes*, in *Gazette du Palais*, 1-2 December 2000, p. 16 ff.; ID., *Diritto di accesso alla giustizia e ordine pubblico internazionale: spunti di riflessione sul* forum necessitatis *in materia arbitrale*, in *Rivista dell'arbitrato*, 2002, p. 25 ff.; CAMBI FAVRE-BULLE et al., *L'arbitrage e la Convention européenne des droits de l'homme*, Brussels, 2001; EMBERLAND, *The Usefulness of Applying Human Rights Arguments in International Commercial Arbitration*, in *Journal of International Arbitration*, 2003, p. 355 ff.; MC DONALD, *More Harm Than Good? Human Rights Considerations in International Commercial Arbitration*, ivi, p. 523 ff.; PETROCHILOS, *Procedural Law in International Arbitration*, Oxford, 2004, p. 109 ff.; SAMUEL, *Arbitration, Alternative Dispute Resolution Generally and the European Convention of Human Rights*, in *Journal of International Arbitration*, 2004, p. 413 ff.; SA. BESSON et al. (eds.), *Human Rights at the Center*, Zürich, 2006; SE. BESSON, *Arbitration and Human Rights*, in *ASA Bulletin*, 2006, p. 395 ff.; CARELLA, *La Convenzione europea dei diritti dell'uomo e i conflitti di legge nell'arbitrato commerciale internazionale*, in CARELLA, *Diritti umani, conflitti di legge e conflitti di civilizzazione*, Bari, 2011, p. 29 ff.; ROMANO, *Nullità di clausole compromissorie negli arbitrati sportivi per squilibrio strutturale tra i contraenti*, in *Diritto del commercio internazionale*, 2014, p. 543 ff.; BENEDETTELLI, *Human Rights as a Litigation Tool in International Arbitration: Reflecting on the ECHR Experience*, in *Arbitration International*, 2015, p. 631 ff.

[2] Decision of 1 March 2016, *Tabbane* v. *Switzerland*. Among the earlier comments see ZARRA, *Rinuncia pre-*

The facts submitted to the Court are quite straightforward.

A French company and a Tunisian businessman entered into a contract including an arbitration clause whereby all their disputes would have been settled under the rules of the International Chamber of Commerce ("ICC").

The French company commenced the arbitration. Once established, the arbitral tribunal, acting in compliance with the arbitration clause, chose Geneva as the seat of arbitration.

During the arbitral proceeding, the request of the Tunisian businessman to appoint a financial expert was dismissed by the tribunal essentially because the counterparty had already nominated its own auditor and the Tunisian might well have accessed to the resulting documents.

Alleging that the refusal to appoint a court-ordered expert was in violation of his right to a fair trial, the Tunisian filed a request to set aside the subsequent final award before the Swiss Federal Tribunal.

The Federal Tribunal declared the request inadmissible because the parties, on the one hand, had previously consented to waive their right to any appeal against any decision of the arbitral tribunal and, on the other hand, such a waiver met the personal and substantive conditions required by Article 192 of the Swiss Law on Private International of Law ("LPIL") to make it legitimate.

Consequently, the Tunisian claimed before the European Court that Switzerland had denied him through Article 192 LPIL the access to a court to challenge the award, thereby violating Article 6 ECHR.

Besides, he complained that the arbitral tribunal in turn violated his right to a fair hearing by dismissing – as noted above – his request to appoint an external expert.

**2.** The European Court declared the application inadmissible as follows.

Firstly, the Court held that the claimant expressly and freely both waived his right to challenge the arbitral decision and agreed – by way of reference to the decision of the arbitral tribunal – on choosing the Swiss LPIL as law of the seat. This implied the application of Article 192 LPIL to the consequences of agreeing to waive the right to challenge the award.

Article 192 LPIL, in turn, seems to the Court compatible with ECHR because it reflects the Swiss legislative policy to increase the attractiveness and effectiveness of international arbitration in Switzerland.

Such a policy comes out as the waiver is limited to foreign parties, i.e. parties not having domicile, or habitual residence or place of business in Switzerland.

In doing so, Switzerland pursues a legitimate aim that warrants for the parties the restriction of their right (of access to a court) to challenge an award.

As for the refusal of the arbitral tribunal to appoint an external expert, the Court deemed on the hypothetical premise that ECHR applied that the claim was manifestly ill-founded because the claimant could have had access to the documents collected by the expert earlier appointed by the counterparty.

**3.** In order to better appraise the European Court's decision in *Tabbane*, it may prove fitting to preliminarily describe in general terms the relationships between ECHR and arbitration.

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*ventiva all'impugnazione dei lodi arbitrali internazionali e incompatibilità con l'art. 6 della Convenzione europea dei diritti dell'uomo*, in *Rivista dell'arbitrato*, 2016, p. 302 ff.

The choice of the arbitration as an alternative means to court for settling a dispute in civil and commercial matters has never raised problems of incompatibility with the ECHR.

In the European Court's views, Article 6 provides for a right to a court/tribunal (as a part of the right to a fair trial) that may be waived in favour of arbitration[3]. Such a waive rests on the arbitration agreement, which gives rise for the parties to a two-fold obligation: one negative (not to bring the dispute before a court) and the other positive (to arbitrate the dispute).

On the other hand, parties to voluntary arbitration may waive certain procedural fundamental rights in compliance with the role of autonomy that largely governs the arbitration either in providing the procedural rules or in requiring the arbitration to abide by institutional rules selected by the parties.

If the parties were to waive certain fundamental procedural rights, the subsequent award would nonetheless benefit from the "protection" of ECHR: for example, the delay or an excessive length in the enforcement of a creditor-award which definitively determines a claim may infringe rights covered by Article 1 of Protocol No. 1[4].

**4.** Agreeing on voluntary arbitration means in the Article 6 perspective to agree on waiving the right of a court, provided that the waiver is valid[5].

Besides, parties who arbitrate their disputes may waive other fair trial rights, such as that for public hearings.

The European Court has remarked, though, that waiving the courts "should not necessarily be considered to amount to a waiver of all the rights under Article 6"[6].

Actually, the authentic equivalence in terms of fair trial between arbitration and court proceedings depend necessarily on whether or not the parties retain the core rights enshrined in (or arising out of) Article 6.

Although the ECHR does not expressly require that arbitration comply with the fair trial (see below), only an arbitration doing so may in fact be compared, and qualified as a real alternative, to court proceedings.

However, neither the ECHR nor the European Court does call contracting States to lay down national arbitration rules in order for arbitration to match the court fair trial standards.

It seems, in fact, that conceiving arbitration and court proceedings as judicial means equivalent one another is a matter falling outside the ECHR and pertaining to the margin of appreciation of each contracting State.

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[3] See European Commission of Human Rights, decision of 5 March 1963, *X* v. *Federal Republic of Germany*, and decision of 27 November 1996, *Nordström-Janzon and Nordström-Lehtinen* v. *The Netherlands*; European Court of Human Rights, judgment of 27 February 1980, *Deweer* v. *Belgium*, decision of 12 December 1983, *Bramelid and Malmström* v. *Sweden*, and decision of 23 February 1999, *Suovaniemi and others* v. *Finland*.

[4] Judgment of 9 December 1994, *Stran Greek Refineries and Stratis Andreadis* v. *Greece*; judgment of 3 April 2008, *Regent Company* v. *Ukraine*.

[5] On the issue see FRUMER, *La renonciation aux droits et libertés. La Convention européenne à l'épreuve de la volonté individuelle*, Bruxelles, 2001. Some authors, moving on from the existence of a valid arbitration agreement, hold that the right of access to justice should also include the legitimate expectation of the parties to arbitrate the dispute: see PETROCHILOS, *Procedural Law in International Arbitration*, p. 115; BENEDETTELLI, *Human Rights as a Litigation Tool in International Arbitration*, p. 650 ff. Different problems arise when the party challenges before a court the validity of the arbitration agreement: see LEANDRO, *Le anti-suit injunctions a supporto dell'arbitrato: da West Tankers a Gazprom*, in *Rivista di diritto internazionale*, 2015, p. 815 ff., also with regard to the Court of Justice's attitude to recognize the right of a judicial protection before courts of Member States (see particularly judgments of 10 February 2009, case C-185/07, *Allianz SpA, Generali Assicurazioni Generali SpA* v. *West Tankers Inc*., para. 31; 13 May 2015, case C-536/13, *"Gazprom" OAO*, paras. 34 and 38).

[6] See *Suovanemi*.

As an example, in Italian legal order the consent to arbitrate a dispute amounts for the parties rather to waiving the "public" judicial protection than to renouncing the judicial protection at all. Thus, Italian Constitutional Court – along with Italian Supreme Court – has stressed that arbitration represents for the parties a means to seek a protection as judicial as that managed by courts[7].

The crucial point in this rationale is again that the equivalence between courts and arbitral tribunals – and the related constitutional basis to arbitrate a dispute – depends on how the arbitral proceedings meet the standards which courts should comply with.

In other words, impartiality, equality of arms, *principe du contradictoire*, all are requirements that the arbitration should meet to get a true alternative to court proceedings (which are supposed to act under those requirements) for would-be arbitrable disputes.

**5.** States may allow parties to challenge the awards as they do with respect to judgments: another evidence of the equivalence between court (judgments) and arbitration proceedings (awards).

Following the European Court's reasoning, that parallelism is (again) left to the margin of appreciation of each contracting State. Therefore, States not allowing[8] parties to waive the right to challenge the arbitral award and States allowing such waiver both act in accordance with the ECHR[9].

In *Tabbane* the European Court goes on so far as to hold that rules on waiving any appeal against the award are compatible with ECHR even if the underpinning claim concerns for the arbitral tribunal the violation of the due process.

As a matter of fact, such a waive is compatible with ECHR because of the margin of appreciation that States enjoy in keeping arbitration and judicial proceedings on different rather than equivalent levels from the due process standpoint[10].

Moreover, the European Court deems that national rules allowing parties to waive the right to challenge the award aim to the legitimate purpose of making the national arbitration rules attractive to parties. By the same token, institutional rules may provide for the waiver of review insofar as such waiver is compatible with the law of the seat[11].

Such an attractiveness comes logically out when parties choose the seat of arbitration, particularly for their preferences as to what powers the national courts should be given with respect both to the arbitration and to the awards.

From a different perspective, waiving the means of challenging strengthens the finality of the award, although expressions in the arbitration agreement referring to the finality like "the award is final and binding" or "without appeal" do not entail waiving any judicial review[12], particularly the review leading to the annulment of the award.

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[7] See Italian Constitutional Court, judgment of 16-19 July 2013, no. 223; Italian Supreme Court, order of 25 October 2013, no. 24153, *Luxury Goods International SA* c. *Swaili Diffusioni S.r.l. in liquidazione*.

[8] For instance, see Article 829-*bis* of the Italian Code of Civil Procedure.

[9] See the abovementioned Swiss LPIL (Article 192(1)) and, *inter alia*, the Belgium Judicial Code (Article 1718), the French Code of Civil Procedure (Article 1522), the Swedish Arbitration Act (Section 51).

[10] For other reasons underlying the waives see with special reference to the Swiss order KRAUSZ, *Waiver of Appeal to the Swiss Federal Tribunal: Recent Evolution of the Case Law and Compatibility with ECHR, Article 6*, in *Journal of International Arbitration*, 2011, p. 137 ff.

[11] See the ICC Rules (Article 34(6)); the LCIA Rules (Article 26(8)).

[12] BORN, *International Arbitration: Law and Practice*, The Hague, 2015, II ed., p. 344.

**6.** Should the parties waive their right to challenge the award in the seat and the arbitral tribunal be alleged to have infringed the due process, all the consequences will depend on where the recognition of the award is sought.

States whose legal order (in compliance with the abovementioned margin of appreciation) requires arbitration to comply with the same fair trial standards as those compelling courts are unlikely to recognize the award.

Actually, even at the *exequatur* stage, the different sensitivity among States as to the equivalence between arbitration and judicial proceeding plays a crucial role for the destiny of the award.

It is worth noting that the European Court and the Court of Justice of the European Union converge in holding that the *exequatur* proceedings may include the assessment on the compatibility of arbitral decisions and arbitral proceedings with the fair trial.

According to the Court of Justice, the interested party "could contest the recognition and enforcement and, second, the court seized would have to determine, on the basis of the applicable national procedural law and international law, whether or not the award should be recognised and enforced"[13].

If the *exequatur* proceedings counterweigh the lack of means to challenge the award in the arbitral seat, then parties may find protection against violations of the due process during the arbitration in all the States in which the *exequatur* is sought.

We assume a difference between State of the seat and State of the *exequatur*, but it may happen that the rules governing the *exequatur* of domestic awards match in the same State those designed to foreign awards: the Swiss order offers an example because Article 192(2) LPIL provides that the recognition and enforcement of Swiss arbitral awards is governed by the 1958 New York Convention.

The point is that a difference lies as much between the action to set the award aside and the action against the *exequatur* as between the grounds for annulment and those for refusing the *exequatur*.

Furthermore, it should be borne in mind that, while the grounds for annulment may vary from State to State, those for refusing the *exequatur* are quite harmonized because of the 1958 New York Convention.

It is also well known that the annulment in the seat not necessarily leads abroad to the refusal of the *exequatur*[14]. Thus, the resulting scenario includes annulled awards being recognized abroad as well as confirmed award not being recognized for the same reasons as those fruitlessly claimed in the State of the seat.

Be that as it may, the role of the *exequatur* proceedings as a means/place to challenge the irregularities of the arbitration comes into light just in case of waiving (or lacking) the right to challenge. In other words, if remedies were to lack in the origin State, only the *exequatur* proceedings – i.e. the place to apply for refusing the recognition/enforcement – remain at disposal of. And what should be regarded in the requested State as a "second look at the decision" if the challenge were to be admissible in the arbitral seat turns into the "first look" if it were not.

However, the Court of Justice and the European Court hold that certain claims against the enforcement of a foreign decision are somewhat inadmissible in the

[13] *"Gazprom"*, para. 38.

[14] On the issue see GIARDINA, *The International Recognition and Enforcement of Arbitral Award Nullified in the Country of Origin*, in BRINER et al. (eds), *Law of International Business and Dispute Settlement in the 21st Century*. Liber amicorum *Karl-Heinze Böckstiegel*, Köln, 2001, p. 205 ff.; RADICATI DI BROZOLO, *The Enforcement of Annulled Awards: Further Reflections in Light of Thai-Lao-Lignite*, in *American Review of International Arbitration*, 2014, p. 47 ff.

requested State, should the claimant party earlier make no use of the internal remedies in the origin State[15].

The background of the enforcement of judgments certainly is different, but the *rationale* of the two Courts is convincing especially against the abuse of invoking grounds of non-recognition. In the same vein, parties who voluntarily do not raise certain objections in due time during the arbitration often are considered estopped from raising the same objections at the annulment/enforcement stage.

**7.** Commentators and authorities stress that certain fundamental standards of due process are established in most national and institutional arbitration rules as a sort of common principles of the fair arbitration, regardless of being different or akin to the procedural requirements of civil litigation[16].

Even if the ECHR standards were not to directly concern arbitration, and assuming that contracting States benefit of a margin of appreciation, an "international procedural public policy" applicable to arbitration nonetheless exists with features somewhat matching the fair trial before courts.

Particularly illustrative is a comparison between the UNCITRAL Model Law on Arbitration and the 1958 New York Convention as to fair trial-inspired procedural requirements.

Article 18 of the UNCITRAL Model Law provides that the "parties shall be treated with equality and each party shall be given a full opportunity of presenting his case".

The New York Convention permits to refuse the recognition where: i) "the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case" (Article V(1)(b)), or ii) "the recognition or enforcement of the award would be contrary to the public policy" of the requested State (Article V(2)(b)).

It is even at first glance evident that said requirements remind those listed or implied in Article 6 ECHR. As is it that there are for contracting States grounds of fairness common to court proceedings and arbitration.

All these requirements enter the box of the "international procedural public policy", which normally accomplishes the task of debarring the recognition and/or warranting the annulment.

In a nutshell, the procedural regularity may be appreciated by court in the subsequent control of the award and may debar the award from being enforced in the State of the seat (due to the annulment) or abroad (due to the refusal of the recognition).

This paper does not address what elements of the due process lie within the "box" of the international procedural public policy.

It should be only considered settled that States benefit of a margin of appreciation as to how the public policy works in their legal order, but, on the other hand, that the core standards of Article 6 amount to a *tronc commun* for all the ECHR contracting States.

Outside the *tronc commun*, the margin of appreciation explains why awards confirmed in the seat may not be recognized if the recognition is contrary to the in-

[15] European Court of Human Rights, judgment of 23 May 2016, *Avotiņš* v. *Latvia*, para. 118 ff. Court of Justice, judgments of 16 July 2015, case C-681/13, *Diageo Brands*, para. 64, and of 25 May 2016, case C-559/14, *Meroni*, para. 47 ff.

[16] See extensively Born, *International Commercial Arbitration*, The Hague, 2014, II ed., pp. 2163-2186, 3211-3230.

ternational public policy of the requested State, but also why annulled awards may exist in the requested State if the recognition is not contrary, and, finally, why the *exequatur* proceedings could in the requested State counterbalance, for the sake of the fair arbitration, the lack of challenging means in the State of the seat.

Conversely, arbitral tribunal should abide by the requirements of the international procedural public policy only when the rules governing the proceedings so require. This frequently occurs, taking into account – as noted above – that most national legal orders and arbitration institutions include fair trial requirements amid their mandatory procedural provisions.

However, arbitral tribunals are not themselves under a duty to comply with Article 6 ECHR, logically because they carry out no State activity.

As a result, arbitral tribunals should meet *only* the fair trial requirements provided for (in detail or by reference to general principles) in the rules governing the arbitration.

This explains why the Court in *Tabbane* has encapsulated in a mere hypothesis its assessments on the violations of the due process allegedly affecting the arbitral proceeding[17].

[17] *Tabbane*, para. 38.

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