May a state invoke its internal law to repudiate consent to international commercial arbitration?

Reflections on the Benteler v. Belgium Preliminary Award

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STATES seeking to evade arbitration to which they have agreed sometimes invoke provisions of their internal law that purport to prohibit the State from entering into an arbitration agreement with a private party. ¹ In the context of international trade today, the clear and widely recognized trend is to refuse to give effect to such domestic prohibitions. ²

The prevailing view is that it would be contrary to fundamental principles of good faith for a State party to an international contract, having freely accepted an arbitration clause, later to invoke its own legislation as grounds for contesting the validity of its agreement to arbitrate.

This principle of good faith has been applied by international arbitrators as an imperative norm perceived without reference to any specific national law. A leading precedent is an award rendered in 1971 under the Rules of Arbitration of the International Chamber of Commerce, in which the tribunal stated that:

... international *ordre public* would vigorously reject the proposition that a State organ, dealing with foreigners, having openly, with knowledge and intent, concluded an arbitration clause that inspires the cocontractant's confidence, could thereafter, whether in the arbitration or in execution proceedings, invoke the nullity of its own promise. ³

In most reported instances, the jurisdictional objection has been raised by a defendant State from the Third World. Many of these States appear jealous of their newly-won independence and unwiring to share it with international arbitrators. Indeed, some commentators have decried the 'privatisation' of arbitration by the means of contracts between States and private parties. They maintain that the application of an overriding substantive international rule upholding the State’s capacity to agree to arbitration constitutes an encroachment on developing nations' sovereignty ⁴ Recently, however, this
issue was thoroughly discussed and resolved in a case where the objection was raised by an industrialised State.

The issue arose in a dispute between German private parties and the State of Belgium. The case was heard in Switzerland by three European arbitrators. The tribunal received extensive memorials and argument on the precise issue of national bars to international arbitration, and dealt exclusively with the jurisdictional objection in a preliminary award, dated 18 November 1983,\(^5\) which confirms the rule that internal legislation cannot nullify agreements to arbitrate before international tribunals. The thoroughness of the award, and its clear statements of principle, make an important contribution to the law in this area.

I. THE BASIC LEGAL ISSUE

Article 1672 (2) of the new Belgian *Code judiciaire* provides:

> Apart from public-law entities, any person who has the capacity or the authority to negotiate a settlement may conclude an arbitration agreement. The State may conclude such an agreement whenever a treaty authorises it to have recourse to arbitration.

The limitation on Belgian State entities' capacity to agree to arbitration is a perpetuation of the French Cole of Civil Procedure of 1806, which was applicable in Belgium until the adoption in 1972 of the *Code judiciaire*. The limitation has been applied consistently and with considerable rigour by both the civil and administrative court of Belgium.\(^6\)

Over the years, by contrast, French legislation has been tempered judicially. In the leading *Galakis* decision, the French Cour de cassation in 1966\(^7\) held that the French State's incapacity to agree to arbitration was applicable only to domestic cases. French precedents are not, however, directly applicable in Belgium. Furthermore, since the Belgian *Code judiciaire*, with its Article 1672(2), was promulgated after the *Galakis* decision, the legislature may be presumed intentionally to have declined to follow the *Galakis* approach. Indeed, as the Award points out, the limitation of the State's capacity to arbitrate had been reinserted into the new law by the Belgian Parliament after initially having been excluded in the Government's draft.

Thus, when confronted with a claim in arbitration, Belgium insisted that Article 1672(2)'s specific reservation relates only to cases submitted to arbitration in application of a treaty, and that the more general French jurisprudential distinction between domestic and international arbitration was implicitly preempted in Belgian law. Hence, there was no room for any inference that the bar to arbitration was intended to apply only to domestic cases.

II. THE DISPUTE

The dispute arose from a tripartite contract signed in 1980 on behalf of the State of Belgium by the Vice Prime Minister/Minister of Economic Affairs and the Minister of Finance, and including as a third party a Belgian mining company (referred to in the Awards 'ABC'). The contract provided for *Erich Benteler* KG and *Helmut Benteler* KG (hereinafter referred to collectively as 'Benteler'), two West German parties, to become shareholders of ABC, and set forth the conditions under which ABC's capital was to be increased. It also provided for Benteler's assistance in the reorganisation and management of ABC as well as in the marketing of its products.

The contract included an *ad hoc* arbitration clause providing that in the event of a dispute, each party would name an arbitrator of its own nationality, and that the two arbitrators so named would choose a chairman of a third nationality. The latter's domicile would become the seat of arbitration. (In the event of a failure of nomination, either party could be able to request that the Swiss National Committee of the International Chamber of Commerce make the designation.) The arbitrators were given authority to decide *ex aequo et bono*.

A dispute arose, and Benteler brought a claim in arbitration against the State of Belgium. Each party named an arbitrator (MM Bockstiegel and Franchimont, respectively), and the two agreed to choose as chairman a leading international
arbitrator, Professor Claude Reymond of Lausanne. The tribunal was immediately faced with the Belgian State's rejection of the arbitrators' jurisdiction on the grounds of Article 1676(2) of the Belgian Code judiciaire.

III. THE PRELIMINARY AWARD

Viewed in a limited perspective, the holding of the award in favour of arbitral jurisdiction is no more than an application of the 1961 European Convention on International Commercial Arbitration (the Geneva Convention), which provides that public-law entities are to be considered as having the capacity to enter into valid arbitration agreements. To apply the Convention, however, the arbitrators had to pronounce themselves on a number of issues that have more general implications.

(a) The legal basis of the decision regarding jurisdiction

Although the parties had given the arbitrators authority to decide *ex aequo et bono*, both parties agreed that the jurisdictional issue should be decided as a matter of law. The arbitrators concurred, noting that the concept that jurisdictional issues should not be decided in equity conforms to the caselaw of the courts of the place of arbitration.8

(b) Applicability of the Geneva Convention

None of the parties contested that the Geneva Convention was in principle applicable to the arbitration agreement contained in the tripartite contract, since it had been concluded between parties domiciled in two signatory States (Belgium and the Federal Republic of Germany).

By virtue of its Article I (1)(a), the Geneva Convention applies:

> to arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States.

Within this ambit, Article II (1) states that:

> legal persons considered by the law which is applicable to them as 'legal persons of public law' have the right to conclude valid arbitration agreements.

Belgium's ratification of the convention had been subject to the reservation (allowed under Article II (1) of the Convention) that the only public-sector entity that could agree to arbitration under the last-cited provision was the State itself. But this subissue did not figure in the case as it was not contested that the contract has in fact been signed on behalf of the State of Belgium.

It is acknowledged in most European legal systems that an international treaty takes precedence over internal law,9 as in fact the last sentence of Article 167(2) of the Belgian *Code judiciaire* explicitly recognises. Under the Geneva Convention, the Belgian State thus had to accept the jurisdiction of the arbitral tribunal unless it could demonstrate either that the agreement did not concern commercial activity, or that it did not concern commerce of an international nature. In the event, Belgium sought to demonstrate both of these propositions.

(c) The law to be applied in determining whether an activity is 'commercial' or 'international'

Should the concepts of 'commercial' or 'international' be defined by reference to national laws or by some international standard? The arbitrators in Benteler v. Belgium held that to conform to the goals of the Geneva Convention, whose preamble speaks of the need to overcome difficulties in the 'organisation and operation' of international commercial arbitration, one should acknowledge that the legal concepts and terms used in the Convention in general have the same meaning as they have in international commercial relations. It would in fact be contrary to the very aims of the Convention to accept that its
terms must be interpreted according to concepts of domestic law, because such an interpretation would lead to the very sort of difficulties which the authors of the Convention intended to avoid.\textsuperscript{10}

The tribunal noted that the New York Convention on the Enforcement and Recognition of Foreign Arbitral Awards of 1958 permits signatory States to limit its ambit to disputes whose nature is commercial according to criteria defined by their own national laws.\textsuperscript{11} The arbitrators held, however, that the notion of 'international commercial activity' is to be understood not by reference to potentially contradictory national definitions, but under a general standard established by the Geneva Convention itself.\textsuperscript{12}

\textbf{(d) The irrelevance of political motives}

The State argued that its intervention in the troubled Belgian mining industry, particularly with respect to the ABC company, was not a commercial activity, but political in nature. The State thus maintained that its initiatives were dictated by public interest rather than by commercial motive, and were moreover based on enabling legislation.

The arbitral tribunal disposed of this argument by rejecting the relevance of the fact, which it acknowledged as obvious in light of the political seriousness of the Belgian steel crisis, that the State's intervention in the restructuring of ABC did not have commercial motives. According to the arbitrators, the motive was not at issue. Rather, they concentrated on the following factors:

(i) the contract 'had the character of a private law agreement', and
(ii) ABC's activity was industrial and commercial in nature; it was not an entreprise d'utilité publique.

It is well known that one of the essential aims of the Geneva Convention was to establish a system of arbitration applicable to commercial relations with East European countries. In those countries all economic activity is, directly or indirectly, in the hands of the State. It would therefore be contrary to the aim of the Convention to exclude from the sphere of its application operations in which a State takes part on the sole grounds that matters of public interest are then involved. The Tribunal therefore accepts that, notwithstanding its political basis, Belgium's entry into the 1980 contract was an act of private law, giving rise to rights, obligations and remedies of private law. In other words, the reasons for the State's intervention do not alter the legal characteristics of the international commercial transaction governed by the 1980 contract.\textsuperscript{13}

\textbf{(e) Standards for characterising activities as commercial}

This subject raises vexing issues in international trade, particularly since liberal and state-directed economies have radically different definitions. In \textit{Benteler v. Belgium}, the arbitrators stated that the concept of international commerce 'cannot be defined better' than the way it was put in the travaux préparatoires of the Convention, which referred to activities 'characterised by the movement across borders of goods, services or currencies.'\textsuperscript{14} The often controversial issue of the juridical value of travaux préparatoires was evaded, for the tribunal noted that the very wording found in the travaux was used in the explanatory parliamentary report on the draft law by which Belgium ratified the Convention,\textsuperscript{15} with the clear implication that this conception was shared by Belgium. Following this definition, the Award reasons as follows:

\begin{quote}
In this case, the contract provides for Benteler's admission as a shareholder in an industrial company, the conditions under which its shareholding would be increased, and its participation in the reorganisation and the management of ABC as well as the marketing of its production. This is, in a wide sense, a joint-venture agreement comporting a shareholders' agreement as well as management and co-operation contracts. Whatever may be the qualification of this type of contract as a matter of internal Belgian law, this is unquestionably a commercial agreement within the meaning of Article I of the Geneva Convention. Joint-venture agreements are in fact one of the typical instruments of international trade law.\textsuperscript{16}
\end{quote}

\textbf{(f) Criteria for determining that commercial activity is international}
Belgium argued that the contract concerned the shareholding, reorganisation, and operation of a Belgian company and that all of the parties’ performance was to take place in Belgium. While the contract anticipated technical and marketing activities of a potentially international character, this aspect of the agreement, Belgium contended, concerned Benteler’s relationships with ABC and not with the Belgian State.

The arbitrators rejected this argument, refusing to consider the tripartite contract as the combination of two contracts - one between Benteler and the state, the other between Benteler and ABC - but rather taking it as an integrated agreement:

It has to be seen as a whole. Quite apart from the foreign identity of Benteler, which by itself might perhaps justify the application of the Geneva Convention from the outset, the agreement has a number of aspects characterised by the movement of goods, services or money across frontiers, such as transfers of funds between Benteler and ABC, share transfers from the State to Benteler, the provision of the Belgian ABC with technical and commercial 'know-how' by German commercial companies etc. Taken as a whole, the contract indubitably concerns international commercial interests within the meaning of Article I (1)(a) of the Geneva Convention.\(^\text{17}\)

The above line of reasoning provided a sufficient foundation for the tribunal's holding. The award goes further, however, and looks to what it calls 'the common law of arbitration' for additional grounds confirming the conclusion derived by the arbitral tribunal from the Geneva Convention alone. These grounds are examined in Sections (g) and (h).

(g) The presumption that public law entities have the capacity to agree to international arbitration

The arbitrators refer to the acknowledgement of public law bodies' capacity to submit to arbitration as ‘a principle which is being ever more generally accepted in the law of international arbitration.’\(^\text{18}\) The tribunal cites Professor Domke in support of the proposition that the rule may now be deemed to have acquired the status of a substantive rule of private international law the observance of which is obligatory in international arbitration' (une règle matérielle de droit international privé dont l’observation s'impose dans l’arbitrage international),\(^\text{19}\) and examines legal developments to that effect in France and in Switzerland. With respect to France, the Award notes that the Galakis decision\(^\text{20}\) remains in force notwithstanding, the promulgation in 1980 and 1981 of new provisions in the French Code of Civil Procedure with respect to arbitration.\(^\text{21}\) As the Report to the Prime Minister of France on the draft legislation made clear.

The new provisions regarding international arbitration relate only to procedural matters and in no way disturb the principles, by now well established by the Cour de cessation, that apply to international arbitration; these principles concern in particular the scope of the international arbitration clause, which, it has been held, cannot be resisted on the grounds ... that the clause was signed by a State or a public-law legal entity. ...\(^\text{22}\)

As for Switzerland, the seat of the arbitration, the Award deems it relevant to note that the pending draft of federal legislation relating to private international law contains a provision in the chapter on international arbitration to the effect that a State or a State entity which has signed an agreement to arbitrate may not invoke its own law to challenge the arbitrability of a dispute within the scope of that agreement.\(^\text{23}\) As a consequence, the arbitrators note, one would be justified in concluding that an award against a State in such a context could not successfully be challenged in Swiss courts as being contrary to Swiss ordre public.

(h) Techniques used to give effect to the principle that a State may not invoke its own law to contest the validity of its consent to arbitrate

Without expressing a view as to their relative merits, but rather suggesting that their coexistence confirms this principle of the 'common law of arbitration' that a State may not use its national law to contest its own consent to arbitrate, the Award defines four conceptual approaches that have led to application of the principle:
(i) Acknowledging a distinction between internal *ordre public* and a less constraining international *ordre public*, and then holding that a prohibition against the State or State entities' agreeing to arbitration is applicable only in domestic matters (the Galakis approach).

(ii) Applying a presumption that with respect to State or parastatal entities in international contracts, the capacity of the State or its subdivisions to conclude arbitration agreements is governed by the proper law of the contract rather than the internal law of the State.

(iii) Holding the prohibition of agreements to arbitrate to be contrary to international public order, in the sense that a State which has concluded an arbitration agreement would be held to act contrary to international *ordre public* if it later tried to affirm that its internal law was incompatible with the undertaking to arbitrate.

(iv) A more moderate variant of the last approach involves an analysis similar to that underlying the notion of estoppel or, as the Award puts it, allowing the international arbitrator to disregard the State's internal prohibition if 'the circumstances of the case are such that the State would be acting contra factum proprium by raising it'.

**IV. CONCLUSIONS**

*Benteler v. Belgium* provides further authority for the proposition that a commercial arbitration between a State and a private party cannot be avoided simply by the State's invoking a prohibition in its own law against arbitration by the State. The Award relies to great extent on the terms of the Geneva Convention of 1961, but since that Convention has not won anything approaching the widespread international acceptance of the 1958 New York Convention, the Award's broader significance derives from the fact that it addresses issues that have often arisen, and may continue to arise, in any commercial arbitration to which a State may be party.

First of all, the Award adopts a wide view, holding that an arbitration between a State and a foreign enterprise involves an 'international' transaction as long as the movement of goods, services, or capital across borders was the expected consequence of the contract. If an agreement contemplates such movement, it is not to be denied an international character only because it relates to the organisation and operation of a company whose production and marketing might be limited to a domestic market. It is hard to criticise this reasoning. Indeed, it might be said that the fact that a State is dealing directly with a foreign investor in and of itself suffices to reject any argument that the transaction was purely national.

Secondly, the Award rejects the notion that a transaction is political rather than commercial if the State was motivated by public interest rather than profits. The arbitrators held that it is the nature of a transaction, rather than the intentions of one of the parties, that gives it its character.

This conclusion is essentially consistent with that of the most modern legislative enactments in the area of sovereign immunities, and it is in conformity with the 1972 European Convention on State Immunity. It is scarcely possible to distinguish trading activity from acts of sovereignty if one is to assess the motives for the act; ultimately, anything a State does is by definition in the public interest. Concentrating on the nature of the State's acts also has the advantage of removing from the analysis criteria which might require unacceptable distinctions on the basis of whether the State has opted for a planned or a free-market economy.

Third, the Award embraces a wide notion of what is commercial. Arguments are occasionally raised, generally by parties seeking to avoid international arbitration, whose effect seems to be that nothing but pure money-for-goods transactions are commercial. The Award points out that joint-venture agreements are one of the 'typical instruments of international trade law' and needs no more to conclude that the contract is a commercial one. On this reasoning it seems clear that the position would be the same with respect to management agreements, turnkey factory contracts, project financing accords, and indeed the full panoply of transactions that are required if goods, services, and capital are to be mobilised internationally.

The final section of the Award, though merely 'confirming' the justifications for the holding, is perhaps the most interesting. The Award clearly acknowledges the existence of a substantive rule of the 'common law of arbitration' to the effect that international arbitrators should reject a State's invoking its own law to contest the validity of its consent to an arbitration agreement. Noting that different intellectual approaches have been followed by international arbitrators in this respect, the Award focuses on the similarity of the outcome achieved in each case rather than on the divergence of reasoning. This permits the Award to refer with commendable insight to these various approaches as different techniques and not different rules; whatever criticism one may have of these approaches individually, they may be understood as reflections of one single rule.
Benteler v. Belgium thus also provides guidance for the situation in which a State invokes its internal law as a bar to arbitral jurisdiction, but - unlike the case of Belgium - is not bound by a contrary treaty obligation. Although its discussion on this point is obiter dictum, the Award clearly approves the rule against recognition of such national bars to international arbitration. The issue is similar to the problem of treaties concluded in contradiction with provisions of internal law. The 1969 Vienna Convention on the Law of Treaties makes clear that consent to be bound lay a treaty can later be denied by reference to a provision of internal law only if it was 'manifest' that an internal rule of 'fundamental importance' had been violated: a 'manifest violation' is defined as one that would be 'objectively evident' to any State conducting itself in the matter in accordance with normal practice and in good faith.

A good ase could be made for the proposition that the rule should be even stricter when one moves from inter-State treaty relations to dealings between a State and a foreign private party. If there is a common law of international arbitration, would not its first rule with respect to contracts with States be that a private party is authorised to rely on the undertakings of members of Government? Requiring the private investor to question a Minister's affirmed authority is hardly conducive to the aims of either the Government or the private party. On the other hand, one may not exclude the possibility that under particular circumstances - such as cases of fraud or corruption - the private party will not be entitled to rely on acts exceeding clearly defined constitutional authority. It is one thing to say that once a State has agreed to arbitration it may not invoke a domestic prohibition of such an agreement, and quite another to question whether the initial agreement was in fact validly given in the name of the State. At any rate, controversy with respect to the formal requisites of the manner in which a State becomes bound to an international agreement - an issue concerning authority to represent the State - should not obscure the fact that the more elementary issue of the State's capacity to agree to international arbitration may today be characterised as a virtually settled matter.

In the final analysis, refusal to accept national law as a jurisdictional bar to international arbitration involving a State may be seen as a necessary complement to the modern rule of restrictive sovereign immunity. It now appears established that the waiver of immunity implicit in a State's agreement to arbitrate is irrevocable, at least with respect to arbitral jurisdiction. International arbitrators have so held, as have national courts. The same rule appears in USA and UK legislation as well as in the 1972 European Convention on State Immunity. If a State cannot invoke its immunity from suit in international arbitration, irrespective of its privileges as defined in national law, one would not expect that another provision of national law, to wit limitations on the State's capacity to agree to arbitration, could have the same effect of neutralising the arbitral mechanism.

If the international system is to evolve in the direction of the rule of law, disputes cannot be decided unilaterally. There is a connection - and

conceptual interstimulation - between the doctrine of restricted sovereign immunity and acceptance of neutral dispute resolution. The Benteler v. Belgium Award is consistent with the general trend toward denial of sovereign immunity wherever States establish business relationships with private parties.

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\[1\] In arbitration between States, such an argument would seem patently invalid as a matter of international law, since in case of conflict between domestic law and an international agreement, a State would be in violation of international law if it gave effect to the conflicting rule of domestic law. As the Permanent Court of International Justice once put it: 'From the standpoint of International Law ... municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures,' Polish Upper Silesia case, PCIJ, Series A, No.7, p. 19. It follows that legislative enactments contrary to international law engage the international responsibility of the State; indeed, the Permanent Court considered 'a principle which is self-evident' to be that 'a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken,' PCIJ, Series B, No. 10, p. 20. Arbitration between a State and a foreign private party may indirectly involve treaty obligations for the State vis-à-vis the private party's own State, notably in cases where an undertaking to submit to neutral arbitration is made in a treaty for the protection of investment. Numerous bilateral treaties create such an obligation; nearly 200 of them are reproduced in the two-volume ICSID publication Investment Treaties (Oceans, Dobbs' Ferry, NY, 1983). An institution for arbitration between States and private parties, comporting a treaty obligation for the State to respect awards rendered under its auspices, was created by the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, see
2 See, eg, the comments of Judge Keba Mbaye of the International Court of Justice and former First President of the Supreme Court of Senegal, in *International Arbitration: 60 Years On - A Look at the Future* 293, at p. 296 (collection of papers from the 60th Anniversary of the International Chamber of Commerce Court of Arbitration, ICC Publication No. 412, 1984): 'For a long time the French-speaking countries of Africa, following the French example, had thought that they could avoid arbitration, by citing procedural rules forbidding them to agree to internal arbitration .... This situation ... was sapping the confidence of the economic partners of these countries. It was a question of pure good faith. A state must not be allowed to cite the provisions of its law in order to escape from an arbitration that it has already accepted:' The late Professor Martin Domke considered that this principle had been affirmed and applied so often that it should be acknowledged in international arbitration as an overriding substantive rule of private international law, in 'Government Immunity in Foreign Trade: A Comparative Survey of Recent Practice,' *Hommage à Frederic Eisemann*, pp. 44 et seq (ICC to Publication No. 321, 1978). See also R. Von Mehren and P. N. Kourides, *International Arbitration Between States and Foreign Private Parties: The Libyan Nationalization Cases*, 75 AJIL 476, 500-504 (1981).
4 See, eg, Philippe Leboulanger, *Les contracts entre Etats et entreprises étrangères* at p. 460 (doctoral dissertation, University of Paris, 1982). Mr Leboulanger also cites the following concepts as instances of this encroachment: the internationalisation or the delocalisation of contracts, the autonomy of the arbitration clause, or, more generally, the exclusion of such national laws as are seen to be in contradiction with those of a liberal economy. For a different view, see J. Paulsson, 'Le Tiers Monde dans l'arbitrage international', 1983 *La Revue de l'arbitrage*, 3, at pp. 33 et seq. For a case in which a court of a developing country specifically rejected an argument by its Government that it would be a denial of its sovereignty to hold the Government bound to submit a contract for the carriage of goods by sea, concluded with a Norwegian company, to arbitration in London, see *Union of India et al v. Lief Hoegh (and) Co et al*, decision of 4 May 1982, High Court of Gujarat, (1983) AIR (Gujarat) 34, extracts in IX *Yearbook Commercial Arbitration* 405 (1984).
5 Excerpts published in *Journal des Tribunaux* (Bruxelles) No. 5289 (31 March 1984); extracts in English translation appear in [1985] *European Commercial Cases* 101. Counsel for Benteler was Alain Hirsch, professor and advocate of Geneva; counsel for Belgium was Roger O. Dalcq, professor and advocate of Brussels.
7 Decision of 2 May 1966, reported in 1966 Dalloz 575; 1966 *Journal du droit international* 648. See H. Batifol, *Arbitration Clauses Concluded between French 'Government-Owned Enterprises and Foreign Private Parties*, 7 *Columbia Journal of Transnational Law* 32 (1968). It has been observed that French courts have not been faced with the issue whether they should accept an argument by a *foreign* State entity that its national law forbade it to agree to international arbitration, R. Bourdin, 'La Convention d'arbitrage international en droit français depuis le Décret du 12 mai 1981', in *Droit et pratique de l'arbitrage international en France*, 11, at p. 19, n. 29 (FEDUCI, Paris, 1984). International arbitrators, on the other hand, have faced this issue and answered in the negative; see the awards cited in note 3 (supra).
9 Note 1 (supra). There is a distinction between the clear principle that a treaty takes precedence over national legislation as a matter of international law applied by international jurisdictions and the more difficult issue whether national courts would in all cases acknowledge the supremacy of treaty undertakings. Article 66 of the Netherlands Constitution provides: 'Legal regulations in force within the Kingdom shall not apply if this application should be incompatible with provisions ... of agreements entered into either before or after the enactment of the regulations'. Although less explicit, Article 55 of the French Constitution states that treaties shall have 'an authority superior to that of laws'; treaties subsequent to legislation are given supremacy under the principle *lex posterior derogat priori*, while treaties antedating legislation - so long as they purport to have effects only with respect to contracting States, which is most often the case - are deemed to prevail on the presumption that the intervening law 'necessarily' made an exception for the situation covered by the treaty. This leaves as the only controverted area that of treaties purporting to have a general normative effect but superceded by inconsistent legislation; here French caselaw is unsettled, and subject to divergent interpretations in commentary, P. Mayer, *Droit International privé*, 33 (1984). Former French colonies have adopted constitutional provisions similar to Article 55. As for Belgium, caselaw and commentary favour upholding treaty obligations over subsequent as well as prior legislation, see Van der Meersch, 'Reflexions sur le Droit International et la revision de la constitution belge', 1969 *Revue belge de droit International*. In contrast, the constitutions of Mexico, Argentina, and the United States explicitly provide that treaties and federal law are of equal rank. The Supreme Court of Argentina has held that in case conflict, a posterior national law
takes precedence over a treaty, *S.A. Martin (and) Cia v. Nation*, 257 *Fallos de la Corte Suprema* 99 (1963). In *Reid v. Covert*, 354 US 1 (1957), the US Supreme Court stated in dictum, at p. 18, that 'an act of Congress ... is on a full parity with a treaty, and ... when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null'.


11 Citing A. J. van den Berg, *The New York Arbitration Convention*, 51 (Kluwer 1981). The relevant provision of the New York Convention is Article I (3). The issue of what is 'commercial' has been raised on several occasions before the courts of India in the context of attempts by foreign parties to enforce awards rendered abroad under the 1958 New York Convention. India ratified the New York Convention in 1970, but did so subject to the 'commercial' exception authorised by the Convention itself, and which means that the Convention applies only to arbitration relating to contracts of a commercial nature. An initial decision on 4 April 1977 by a sole judge of the Bombay High Court in *Indian Organic Chemicals Ltd v. Chemtex Fibres Inc* (1978) AIR (Bom.) 106, held that a contract could not not be recognised as 'commercial' unless it were specifically so defined under positive Indian legislation. The court accordingly refused to defer to ICC arbitration in London with respect to a dispute arising out of contracts for the sale and erection of an industrial plant. This parochial holding was rejected by the Division Bench of the Bombay High Court, decision of 4 November 1981, [1983] AIR (Bom.) 36. Confirming the better view, a quite recent decision by the High Court of Gujarat of 4 May 1982; (1983) AIR (Gujarat) 34; excerpts in IX *Yearbook Commercial Arbitration* 405 (1984), and which seems in harmony with the *Benteler v. State of Belgium Award*, rejected the Government of India's claim that since a contract for carriage of goods by sea is not recognised as commercial by any positive law of India, the Food Corporation of India (acting as agent for the Department of Agriculture) was not bound by the New York Convention to arbitrate a dispute with a Norwegian shipping line. B. K. Mehta, judge, stated *inter alia*; *ibid*, at p. 407: 'It cannot be urged successfully without violence to the language that the charter party contract for carriage of goods by sea is not commercial in nature. The term 'commerce' strictly relates to dealings with foreign nations, colonies, etc (vide: The Webster's Third New International dictionary at p. 456). It is a word of the largest import and takes in its sweep all the business and trade transactions in any of their forms including the transportation, purchase, sale and exchange of commodities between the citizens of different countries (vide: *Welton v. Missouri* (1975) 91 US 275). ... '[t] cannot be gainsaid that the charter party contract is commercial in its nature. The question, whether it is recognised as such in any law in force in India is also not capable of much debate. The Indian Carriage of Goods By Sea Act, 1925, was put on the statute book with effect from 21 September, 1925, for the purpose of amending the law with respect to the Carriage of Goods Act ...'.


14 Citing *P. Fouchard, L'arbitrage commercial international*, 22, at note 40 (1965) ; *David (supra)* note 12, at p. 218.


19 Note 2 (supra). One of the arbitrators on the *Benteler v. Belgium* tribunal has recently written that 'where the state or one of its public entities has accepted an arbitration clause, it is considered as part of international public policy that they cannot later claim that they could not submit to arbitration due to their own national laws', K.-H. Böckstiegel, *Arbitration and State Enterprises: Survey on the National and International State of Law and Practice* 25 (Kluwer/ICC, Devanter, Netherlands, 1984) (reviewed in I *Arbitration International* 195 (1985)).

20 Note 7 (supra).

21 See generally Craig, Park, and Paulsson, note 3 (supra), Chapter 30.


23 See Craig, Park, and Paulsson, note 3 (supra), § 32.08.

24 Note 7 (supra).


26 See the oft-quoted passage from ICC Case 1939, reproduced (supra) in text at note 3.

27 The New York Convention has been ratified by 62 States spread over all continents and including countries of widely varying economic levels and political orientation. The Geneva Convention has been ratified by only the following 19 States: Austria, Belgium, Bulgaria, Byelorussian SSR, Cuba, Czechoslovakia, Democratic Republic of Germany, Denmark, Federal Republic of Germany, France, Hungary, Italy, Poland, Romania, Spain, Ukrainian SSR, USSR, Upper Volta and Yugoslavia. For a discussion of the Geneva Convention's limitation of the grounds upon which an adhering State may refuse recognition of an award, which in fact go significantly further than the New York Convention, see J. Paulsson, 'Delocalisation of International Commercial Arbitration: When and Why It Matters', 32 *ICLQ* 53, at p. 61 (1983).
the award. Otherwise, in order to prove that the herd of State violated a treaty (GB v. US, 1920); see G. Delaume, The State Immunity Act of the United Kingdom, 73 AJIL 185 (1979).

For a consonant view that the notion of ‘commercial’ in an international context should not be viewed by French courts as ruled by domestic concepts (for the purposes of the purely internal commercial law/civil law distinction), see Y. Derains, ‘Sources et domaine d'application du droit français de l'arbitrage international’, in Droit et pratique de l'arbitrage international en France, 1, at p. 9 (FEDUCI, Paris, 1984).


For example, the concept that the capacity of a State or a State entity should be presumed to be governed by the proper law of the contract rather than the law of the State is open to the criticism that it may create a vast and unintended distinction between agreements subjected to a neutral law and those that are in fact governed by the law of the State party. Furthermore, it would mean that an absence of contractual stipulation of applicable law might entail risks of enormous and equally unintended dimensions. It would finally make it far more difficult to obtain agreement that the law of the State should apply; well-advised private parties who might otherwise find it reasonable that local law apply to a contract to be executed on the territory of the State would become irreplaceable opponents of such a stipulation.

31 The entire text of Article 46 of the Convention reads: ‘1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.’


33 The following reported precedents may be recalled: In Wauquier et Cie v. Government of Turkey et al (1930), 10 Recueil des Décisions des Tribunaux Arbitraux Mixtes, 65 (1930); 1929-30 Annual Digest and Reports of Public International Law Cases, Case No. 262, at p. 434, the French Government argued that the Governor General of Vilayet, who had entered into a supply contract on behalf of the Municipality of Sivas, had no authorisation to contract in the name of the municipality and that therefore the Government did not have to pay the outstanding portion of accounts due on the shipment. The international tribunal rejected this argument, holding that the contractor was entitled to rely on the authority of the Governor General. In the Hemming (GB v. US, 1920); 6 Rep. Int. Arb. Awards, 51, and Trumbull (Chile v. US) Moore, 4 International Arbitrations, 3569 (undated, decided under a 1982 convention) inter-State arbitrations, both applying general principles of international law, the US Government was held not entitled to repudiate the engagement of local counsel by the US diplomatic services in India and Chile, respectively; it did not matter that the US Government was correct in arguing that its own consular regulations did not authorise local consuls to employ legal advisers. Finally, in the well-known 1933 Eastern Greenland case (also known as the case of the Ihlen Declaration), the Permanent Court of International justice held that an oral declaration of the Norwegian Minister of Foreign Affairs to his Danish counterpart to the effect that Norway would never occupy any part of Greenland meant that 'Norway reaffirmed that she recognises the whole of Greenland as Danish; and thereby she has debarred herself from contesting Danish Sovereignty over the whole of Greenland', PCIJ, Series A/B, No. 53, 70/71. Considering practice to be 'uncertain', Nguyen Quoc Dinh, Patrick Daillier and Alain Pellet, in their second edition of Droit international public (Paris, 1980) summarise at pp. 180-1 the principal systematic approaches to the problem of 'imperfect ratifications' as follows: First, the dualistic concept, which denies any international effect to national constitutional flaws of the consent to a convention; a treaty concluded in violation of domestic constitutional rules remains valid under international law. Second, the monistic theory which would reach the opposite conclusion; national constitutional rules partake of the international order by 'complementing' the international treaty-making process. Third, an attempt to reconcile these theoretical approaches may be referred to as an empirical approach, under which only a violation manifeste d'une disposition constitutionnelle noyau would invalidate a purported engagement on behalf of the State. ‘... in all other cases, the ratification of a treaty by a head of State constitutes an affirmation that all competent State organs have truly accepted that the treaty become definitive, and then he should be believed. Otherwise, in order to prove that the herd of State violated a constitutional rule of any trend, it would be necessary that the other parties interpret it themselves, which they do not have the right to do by virtue of the principle of non-interference in internal affairs’. Ibid, at p. 181 (author's translation; emphasis in the original). Cf. the provision of the Vienna Treaty quoted (supra) note 33.

34 In the 1982 Aminoil v. Kuwait award, which applied inter alia general principles of law, the distinguished tribunal presided by Paul Reuter stated that 'it is entirely normal and useful that, in transnational economic relations, the capacity of the Minister in charge of economic affairs should be presumed, as is that of a Minister for Foreign Affairs in inter-State relationships', 21 International Legal Material, 1006 (1982). This concept has not been extensively developed in public international law. The following reported precedents may be recalled: In Wauquier et Cie v. Government of Turkey et al (1930), 10 Recueil des Décisions des Tribunaux Arbitraux Mixtes, 65 (1930); 1929-30 Annual Digest and Reports of Public International Law Cases, Case No. 262, at p. 434, the French Government argued that the Governor General of Vilayet, who had entered into a supply contract on behalf of the Municipality of Sivas, had no authorisation to contract in the name of the municipality and that therefore the Government did not have to pay the outstanding portion of accounts due on the shipment. The international tribunal rejected this argument, holding that the contractor was entitled to rely on the authority of the Governor General. In the Hemming (GB v. US, 1920); 6 Rep. Int. Arb. Awards, 51, and Trumbull (Chile v. US) Moore, 4 International Arbitrations, 3569 (undated, decided under a 1982 convention) inter-State arbitrations, both applying general principles of international law, the US Government was held not entitled to repudiate the engagement of local counsel by the US diplomatic services in India and Chile, respectively; it did not matter that the US Government was correct in arguing that its own consular regulations did not authorise local consuls to employ legal advisers. Finally, in the well-known 1933 Eastern Greenland case (also known as the case of the Ihlen Declaration), the Permanent Court of International justice held that an oral declaration of the Norwegian Minister of Foreign Affairs to his Danish counterpart to the effect that Norway would never occupy any part of Greenland meant that 'Norway reaffirmed that she recognises the whole of Greenland as Danish; and thereby she has debarred herself from contesting Danish Sovereignty over the whole of Greenland', PCIJ, Series A/B, No. 53, 70/71. Considering practice to be 'uncertain', Nguyen Quoc Dinh, Patrick Daillier and Alain Pellet, in their second edition of Droit international public (Paris, 1980) summarise at pp. 180-1 the principal systematic approaches to the problem of 'imperfect ratifications' as follows: First, the dualistic concept, which denies any international effect to national constitutional flaws of the consent to a convention; a treaty concluded in violation of domestic constitutional rules remains valid under international law. Second, the monistic theory which would reach the opposite conclusion; national constitutional rules partake of the international order by 'complementing' the international treaty-making process. Third, an attempt to reconcile these theoretical approaches may be referred to as an empirical approach, under which only a violation manifeste d'une disposition constitutionnelle noyau would invalidate a purported engagement on behalf of the State. ‘... in all other cases, the ratification of a treaty by a head of State constitutes an affirmation that all competent State organs have truly accepted that the treaty become definitive, and then he should be believed. Otherwise, in order to prove that the herd of State violated a constitutional rule of any trend, it would be necessary that the other parties interpret it themselves, which they do not have the right to do by virtue of the principle of non-interference in internal affairs’. Ibid, at p. 181 (author's translation; emphasis in the original). Cf. the provision of the Vienna Treaty quoted (supra) note 33.

35 See, eg the Southern Pacific Properties v. Egypt award of 1983 (ICC case no. 3493); the Sotel Boneh v. Uganda award


37 Foreign Sovereign Immunities Act of 1976, (supra) note 28, section 1605 (a)(1); see Delaume, (supra) note 35, at pp. 786-788.


39 (Supra) note 29, Article 12 (1).

Referring Principles:

IV.2.3 - No repudiation of contractual consent by state party