Title: Ad Hoc-Award of May 27, 1991, YCA 1992, at 11 et seq.

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AD HOC - UNCITRAL

Award of 27 May 1991

Arbitrators: Prof. Albert Jan van den Berg, chairman (Neth.); Prof. Andreas F. Lowenfeld (US); Dr. Claus Schellenberg (Switz.) (partially dissenting)

Parties: Claimant: Association of service industry firms (Switz.); Respondent: Service industry firm (country X)

Place of arbitration: New York, USA

Subject matters:
- "compelling reasons" to withdraw from Swiss association having as members firms from over 50 countries (no)
- freedom to withdraw from Swiss association
- validity of clause requiring payment of compensation upon withdrawal under Swiss law
- evasion of mandatory law (no)
- interest
- cost of arbitration

Facts

In 1982, claimant, which had previously consisted of affiliated firms active in the same service industry bound by various agreements, was founded as an Association (Verein). Its constitutive document was the "Articles". In addition, the member firms entered into an agreement among themselves entitled "Supplemental Agreements". Respondent, being a firm in country X (not being Switzerland), joined the Association later in 1982 and in doing so executed a Declaration of Acceptance of both the Articles and the Supplemental Agreement, as well as separately signing the Supplemental Agreement.

By letter of 22 June 1989, respondent informed claimant that it intended to withdraw from the Association and to merge with the firm Q in country X with which it had been negotiating. The combined firm would be internationally represented by a group (identified in this extract as R) which was a competitor of claimant.

Although most issues regarding the withdrawal were resolved between claimant and respondent, a dispute arose regarding the payment by respondent of the compensation for withdrawal as provided in the Articles and in the Supplemental Agreements. Claimant initiated arbitration on 29 June 1990. The arbitration clauses in the Articles and Supplemental Agreements provided for arbitration in accordance with the UNCITRAL Arbitration Rules, in New York City. The Articles and the Supplemental Agreements provided that Swiss law was the governing law.
In the arbitration, both parties submitted legal opinions by experts on Swiss law regarding the right of a member of a Swiss association (Verein) to resign, and on the legal validity of an obligation for a member for a Swiss association to pay compensation on withdrawal from the association.

The majority found that there was no legal impediment to requiring respondent to pay compensation and ordered respondent to pay the amount as specified in the Articles and Supplemental Agreements.

Extract

[...]

II. The Validity of the Withdrawal Clause under Swiss Law

[...]

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C. The General Approach of the Majority

[11] "The majority of the Tribunal proceeded from the general principle *ut res magis valeat quam pereat*; in other words the point of departure of the majority was that when commercial parties enter into legal arrangements after lengthy negotiations conducted with the help of professional advisers - i.e., there is no suggestion of unfair bargaining or pressure - they should be held to their bargain. Of course, parties are not to be permitted to contract to perform an unlawful act; but when there is nothing inherently unlawful or immoral about the arrangement concluded by the parties, and no evidence of intent to evade mandatory restrictions, the law should be construed, if fairly possible, in such a way as to uphold rather than to frustrate the intent of the parties. This principle is particularly compelling when, as here, the arrangement in question has many parties from different states who chose Switzerland as the home for their association, and when numerous arrangements similar to the one here challenged are in effect among persons in many different industries who are not party to the present controversy."

[...]

Referring Principles:

IV.5.3 - Interpretation in favor of effectiveness of contract