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AD Hoc

Benteler v. Belgian State


[...]

Procedural background

This preliminary award was rendered by a panel of three arbitrators, Messrs. Reymond (President) Böckstiegel and Franchimont, in a dispute relating to a Protocol of Agreement entered into by the Belgian State of the first part, Dipl. Ing. E. Benteler and H. Benteler from the Federal Republic of Germany ("Benteler") of the second part, and the company A.B.C. s.a. ("ABC") of the third part. The Protocol, signed in Brussels on February 4, 1980, related to the industrial and financial restructuring of ABC.

Art. 14 of the Protocol contains an arbitration clause which reads as follows:1

"Arbitration. All disputes between the State and Benteler which may result from this agreement will be decided upon in all sovereignty and without appeal by an arbitral tribunal. The latter may take its decision ex aequo et bono. The arbitral tribunal shall also determine its fees. The arbitral tribunal shall be composed of three members. Each of the first two parties shall nominate one arbitrator of its nationality. The two arbitrators so nominated shall designate the third arbitrator of another nationality, who shall assume the presidency of the arbitral tribunal. The arbitral tribunal's seat shall be at the president's domicile. Upon failure of a party to nominate its arbitrator within the time limit of 30 days after having been invited to do so by the other, or upon failure of two arbitrators first nominated to reach an agreement as to the third arbitrator within 30 days, each of the two parties may ask the Swiss committee of the International Chamber of Commerce to designate such arbitrator."

After a major dispute occurred between Benteler and the Belgian State, the former started arbitration proceedings. The latter raised the invalidity of the arbitration clause from the outset, arguing that it was prevented from submitting to arbitration by Art. 1676 of the Belgian Code Judiciaire.

A first hearing was held in Geneva, on February 8, 1983, and it was decided that the issue raised as a preliminary question by the Belgian State would be decided accordingly.
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"II. On the application of the 1961 Geneva Convention

"The problem submitted to the arbitral tribunal thus concentrated, at the end of the first stage of this arbitration, an the question of knowing whether the dispute referred to it as a substantive issue springs from international commercial operations, within the meaning of Art. I, al. 1 lit. a of the 1961 Geneva Convention.

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[...]

"To conclude, the arbitral tribunal accepts that the substantive issue of the dispute referred to it arose from international commercial operations (Art. I of the Geneva Convention) and that consequently, the Belgian State had the power of validly entering into an arbitration agreement for the settlement of this type of dispute (Art. II Convention).

[...]

"III. The common law of arbitration

"It is useful to point out that other considerations confirm the conclusion this arbitral tribunal draws solely from the Geneva Convention.

"From a more general point of view, it is important to stress that Art. II of the Geneva Convention, which forms the basis of public law legal entities' capacity to resort to arbitration, is in no way exceptional. It is indeed, to the contrary, a principle more and more generally accepted in international arbitration law. Through various means, this principle has been so often stated and applied that some have gone so far as to consider it a material rule of private international law whose observance emerged in international arbitration (see: Martin Domke, "Government immunity in foreign trade arbitration - A comparative survey of recent practice". Liber amicorum F. Eisemann, pp. 45 et seq.). In this arbitration, both parties repeated the well known development of the jurisprudence of the French Cour de Cassation, as it culminated in the Galakis case (Revue critique, 1967, p. 553, note Goldman; Clunet 1966, p. 648, note Level; D.,1966, p. 575, note Robert; J.C.P., 1966, II, 14798, note Lipman; Rev. Arbitr., 1966, p. 99). In this respect, the parties stressed that this jurisprudence was generally received in France "in spite of the adoption of the new Code of Civil Procedure". Enacted by decree, the new French Code of Civil Procedure could not contain provisions relating to arbitration agreements, a subject governed by the Civil Code. By contrast, the report to the Prime Minister accompanying the proposed Bill of the Code of Civil Procedure expressly reiterated that "the new provisions an international arbitration are limited to questions of procedure and do not effect in any way the principles that the Cour de Cassation has now well established as regards the legal regime of international arbitration; such is in particular the case of the scope of the international arbitration agreement about which it had been judged that it could not be challenged on the ground (...) that the arbitration agreement (...) had been concluded by a State or a public law legal entity" (cited by Ph. Fouchard, Rev. Arbitr., 1981, p. 461).

"The technique adopted by the Galakis case had consisted in distinguishing, as to the enforcement of Art. 1004 of the code of Civil Procedure, between domestic public order and international public order, considering that the prohibition of Art. 1004 only applies within the domestic order. As both parties noted, several Belgian commentators have approved of this jurisprudence, and have expressed their desire for its enforcement by Belgian courts. The arbitral tribunal perused
with greatest interest Belgian case law and doctrinal opinions that both parties submitted. Given the decision taken as to the application of the Geneva Convention, it will not examine them again at this stage, neither will it give its opinion on the delicate issue of the international effect of Art. 1676 of the *Code judiciaire*.

"Another technique, used in France and in other countries, is the submission of the State's capacity to enter into an arbitration agreement to the law of the contract and not to its national law (see in this sense, a judgment of the Tribunal de Première instance of Tunis, March 22,1976, Rev. Arbitr., 1976, p. 268; Yearbook Commercial Arbitration, 1978, p. 283).

"A third formula, very widely used by international commercial arbitrators, consists in considering the prohibition an arbitration as being contrary to international public order. In consequence, the State which has subscribed to an arbitration clause or an arbitration agreement would act contrary to international public order in later invoking the incompatibility of such an obligation with its domestic legal order.

Without going that far, one can also conceive that the international arbitrator dismiss the argument based an this prohibition when the circumstances of the case are such that the State would go contra factum proprium in raising it.

"In an arbitration located in Switzerland, one might well finally point out that the Federal Bill on private international law recently submitted to the Parliament by the Swiss Federal Government contains, in the chapter dealing with international arbitration, a provision providing that the State or the Government agency, party to an arbitration agreement, cannot invoke its own law in order to contest the arbitrability of a dispute at which the arbitration agreement aims. One can thus conclude that an award dismissing the argument based an the prohibition made to a State of submitting to arbitration would likely not be deemed as contrary to Swiss public order.

"However that may be, the arbitral tribunal does not have to rule on this issue, Art. II of the Geneva Convention being enough to justify its decision. On the other hand, this brief reminder of the present state of international arbitration law can only reinforce, if needed, the interpretation given to this Convention in the dispute referred to [the arbitral tribunal]."

\[Note Ed.: The French original text of Article 14 reads as follows: "Arbitrage - Tous les litiges entre l'État et Benteler pouvant résulter de cette convention, seront jugés souverainement et sans appel par un tribunal arbitral. Il peut décider ex aequo et bono. Le tribunal arbitral fixe également ses émoluments. Le tribunal arbitral se compose de trois membres. Chacune des deux premières parties nomme un arbitre de sa nationalité. Les deux arbitres ainsi nommés désignent le troisième arbitre d'une autre nationalité qui assume la présidence du tribunal arbitral. Le tribunal arbitral a son siège au domicile du président. Lorsqu'une des parties se nomme par son arbitre dans le délai de 30 jours après y avoir été invité par l'autre ou lorsque les deux arbitres nommés en premier lieu ne peuvent, dans un délai de 30 jours, se mettre d'accord sur la personne du troisième, chacune des deux parties peut demander au comité suisse de la Chambre de commerce internationale de désigner l'arbitre en question."

\[Note Ed.: original French text: "[L]es dispositions nouvelles sur l'arbitrage ne concernent pas la procédure et ne remettent nullement en cause les principes maintenant bien établis par la jurisprudence de la Cour de cassation en ce qui concerne le régime juridique de l'arbitrage international; il en est ainsi notamment de la portée de la convention d'arbitrage international au sujet de laquelle il a été jugé qu'il ne pouvait y être mis obstacle au motif (...) que la convention d'arbitrage (...) avait été conclue par un État ou une personne morale de droit public."

**Referring Principles:**

1. I.1.2 - Prohibition of inconsistent behavior