

Arbitral Tribunals' Decisions on Competition Law Are Unreviewable in Switzerland

The Swiss Supreme Court has held that it will not review competition law matters decided in international arbitration awards. This applies no matter what arbitrators sitting in Switzerland decide in relation to competition law questions, unless the arbitrators refuse to decide on such questions which a party submits to them.

Despite many applications, in recent years the Swiss Court appears never to have set aside an international arbitration award on substantive public policy grounds. According to the Swiss Court, substantive public policy comprises a body of “essential and widely recognised values which, in accordance with views prevailing in Switzerland, must constitute the foundation of *every* legal order”. (emphasis supplied) The heart of the Court’s analysis was that divergences between systems of competition law around the world, and indeed, on occasion, the entire absence of competition law in certain States with planned economies, evidences that the values underlying competition law are not sufficiently important to meet this standard.

This decision is of broad significance in Switzerland. Although the facts of the case related to EC and Italian competition law, the case would appear to apply to any competition law. Moreover, the Swiss courts will probably use the same standard in relation to public policy grounds for the refusal *to enforce* international arbitration awards in Switzerland too.

As a result, a Swiss arbitral tribunal has the last word on any competition law matters arising in an international arbitration, except perhaps where enforcement of the award is sought outside of Switzerland. For instance, in *Eco-Swiss China Time Ltd. v. Benetton International NV*¹, the European Court of Justice took precisely the opposite view to that of the Swiss Court. The ECJ required EU Member State courts, within their jurisdiction, to review international arbitration awards for compatibility with EC competition law. It stated that EC competition law may be regarded as a matter of public policy for the purposes of refusing to enforce a foreign arbitration award under the New York Convention.

Source: X. S.p.A. v. Y. S.r.l., March 8, 2006, 4P.278/2005, selected for official publication, and currently available from the website of the Swiss Supreme Court, www.bger.ch (direct link to full text on <http://www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm>).

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¹ [1999] ECR I-3055.