

Judgment of the Swiss Supreme Court of 8 March 2006 – A Commentary

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1. Introduction

On 8 March 2006, the Swiss Supreme Court handed down a judgment¹ rejecting an action seeking the annulment of an arbitration award on the basis that its alleged incompatibility with EC and Italian competition law rendered it contrary to public policy, within the meaning of Article 190(2)(e) of the Swiss Private International Law Act (“PIL Act”). In a number of ways the judgment is unexceptional. It reiterated the position on competition law and public policy enunciated by the Supreme Court twice before.² It is moreover fully consistent with the Supreme Court’s unwavering general theory on the public policy ground for annulling arbitration awards. The sole original contribution of the judgment to that theory, a modest one, is finally to settle the question from what perspective one should view public policy in this context. Previous recent case law had, however, foreshadowed this particular clarification,³ so it does not astonish. Yet perhaps with this judgment everything has changed.

2. Summary of the Facts

Two companies entered into an agreement, subject to Italian law, to tender jointly in connection with stays and pre-constrained cables work on two trunks of the high speed railway line being built between Milan and Naples. The agreement forbade the parties to tender separately, both alone and in conjunction with other parties.

When one of the parties, alone and with certain third parties, was awarded various works in connection with this project, the other initiated ICC arbitration in Lausanne, Switzerland. On 13 September 2002, the three member arbitral tribunal issued an award finding that the agreement was valid and in particular not void as in violation of Italian and EC competition law. It found moreover that the respon-

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¹ Judgment of 8 March 2006, 4P.278/2005; published in 24 ASA Bulletin 3/2006 (September), at p 521, with a commentary by P Landolt, at p 535.

² ATF 128 III 234, consid. 4c at 242; Judgment 4P.119/1998 of 13 November 1998, consid. 1b/bb, published in ASA Bulletin 1999 at pp 529 *et seq.*

³ See, for example, judgment of 8 April 2005, 4P.253/2004, consid. 3.1.

dent had intentionally and grievously breached its obligation of exclusivity under the agreement. In consequence, it awarded the claimant compensation in the amount of €4,250,000.

The respondent sought the annulment of this award before the Swiss Supreme Court, invoking as its sole ground the incompatibility of the award with substantive public policy, for its alleged failure to find the agreement in violation of Italian and EC competition law by its object, and therefore void.

3. Summary of the Court's Ruling

The Court's substantive analysis in this case is in two parts. First, the Court examined the source of the values which compose public policy for these purposes, whether Swiss, transnational, or a mixture of the two. Secondly, the court determined whether the values underlying competition law in general, and Italian and EC competition law in particular, were among those the violation of which could constitute a contravention of public policy.

The Court had for some time remained non-committal about the source of the values relevant to substantive public policy. Thus the formula it had derived to refer to the relevant values was as follows: "An award is contrary to substantive public policy where it violates the fundamental substantive legal principles of *the determinant system of values*" (emphasis supplied).⁴ At times this "determinant system of values" was that of Switzerland.⁵ At times it was the values found in "civilised States" and therefore "supranational values".⁶ The Supreme Court also had not settled whether the source of public policy values might depend on the links the particular case had to various States, and in particular to Switzerland.⁷

In this case the Court settled the point:

Under the assumption that it is necessary to commit to formulating a definition, one might say that an award is incompatible with public policy if it disregards essential and widely recognised values which, in accordance with conceptions prevalent in Switzerland, must constitute the foundation of any legal order.⁸

The Court's answer to the second question was that competition law does not meet this test.

⁴ See case cited in note 382 above, consid. 2.2.1., at 527 of the ASA Bulletin.

⁵ AFT 126 III 534 at 538; AFT 125 III 443 at 447.

⁶ AFT 120 II 155 at 166–167.

⁷ AFT 117 II 604 at pp 606–607; AFT 116 II 634 at pp 636–637.

⁸ See case cited in note 382 above, consid. 2.2.3., at p 529 of the ASA Bulletin.

4. The Court's Reasoning

4.1. *The Source of Values Underlying the Concept of Public Policy*

By way of justifying the transnational character of public policy in this context, the Court supplied a functional explanation for its previous case law. This it characterised as an attempt to detach the concept of public policy from any national connecting factor. Accordingly, the function of this ground of annulment is not to protect the Swiss legal order or to punish the faulty application of foreign substantive laws of application in the case, even mandatory laws.

As for the fact that it was the Swiss view of values which every legal order must be built upon, the Court supported itself upon the supposed intention of the Swiss legislator, which “necessarily had in mind the system of values which is found in the part of the world where it is charged with passing laws and principles constituting the foundations of the civilization to which this country belongs.”⁹

4.2. *Compatibility with Competition Law not Assurable by Public Policy Review*

The Court first noted the existence and general role of competition law in Switzerland and then observed that the “principal industrialised States and certain developing countries have competition law”. The Court stated, however, that the existence of competition law was conditioned upon a State’s having a liberal economy and that “[...] it would be presumptuous to consider that western, European, and Swiss conceptions in relation to competition law must obviously be accepted by all States on the planet”.¹⁰

Not only did the Court find competition law to extend from values which were contingent and not sufficiently universal, it found that they were not in the nature of “moral principles or fundamental principles of law” since no one would condemn States for not having competition law. Here one sees a requirement of quality. Independent of how widely found the value is, for inclusion among public policy values it must be very deeply felt, indeed it may perhaps even need to have enwreathed itself in moral claims.

Thirdly, the Court found that the extent of differences which existed among competition law systems in the world made it difficult to discern a clear principle from them: “In reality, the differences between the various regulations of competition are too pronounced – notably as between Switzerland and the European Union – for one to be able to find here a transnational rule, or a rule of international public policy.”¹¹ This is both a criticism as to insufficient universality, and a criticism as to the impracticality of according public policy protection to competition law.

⁹ See case cited in note 382 above, consid. 2.2.2., at pp 528–529 of the ASA Bulletin.

¹⁰ See case cited in note 382 above, consid. 3.1., at p 530 of the ASA Bulletin.

¹¹ Case cited in note 382 above, consid. 3.1., at p 530 of the ASA Bulletin.

Lastly, the Court adverted to the fact that the approach which it had adopted avoided difficulties inherent in reviewing arbitration awards for compliance with foreign laws such as EU law, and the limited nature of any such review at all events, in view of restrictions on the Supreme Court's powers to interfere with arbitrators' findings of fact.

The Court also refuted two looming criticisms of the view it had just adopted. The first such criticism is the divergence from views expressed on these matters by the European Court of Justice (ECJ). In *Eco Swiss*¹² the ECJ considered that Article 81 EC (on agreements and concerted practices in restraint of competition) expressed values which are to be treated as material to the public policy enquiry not only for annulment purposes but also under the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

The Swiss Supreme Court countered, however, that this conclusion of the ECJ was predicated upon Article 81 EC being a "fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market".¹³ The Court drew from this the conclusion that such values are confined to the Community itself, "with the result that it is not possible to discern a more general, undisputed principle which is common to all countries claiming to be of the same civilisation as that of Switzerland".¹⁴

Moreover, observed the Court, the mandatory character of EC competition law upon EU Member State courts is connected to the existence of "internal procedural rules" obligating such courts to annul awards that disregard national principles of public policy.

At all events, within the European Union, the implementation of Article 81 EC is subjected to limitations in the national court's powers to review an arbitration award. The Court observed that, as seen in the *Thalès* decision of the Paris Court of Appeal¹⁵, such limitations can be decidedly severe.

Secondly, the Supreme Court addressed the contradiction, apparent at least, between the requirement on arbitrators to apply competition law which is not of the *lex contractus* if so requested by a party, and the fact that competition law values do not enjoy public policy protection. The Supreme Court's defence to such a criticism is that the arbitrator's public policy is different to the public policy of the reviewing court.¹⁶

¹² Case C-126/97 – *Eco Swiss China Time Ltd. v Benetton International NV*, [1999] ECR I-3055.

¹³ Case cit. at note 393, paragraph 36.

¹⁴ See case cited in note 382 above, consid. 3.1., at p 531 of the ASA Bulletin.

¹⁵ *SA Thalès Air Défense v GIE Euromissile*, decision of the Paris Court of Appeal of 18 November 2004, published in *Rev de l'arb* 2005, pp 750 *et seq.*

¹⁶ See case cited in note 382 above, consid. 3.3., at p 533 of the ASA Bulletin.

5. Commentary

5.1. *The Source of Values Underlying the Concept of Public Policy*

The Supreme Court's reasoning in support of the position it adopted on the source of values underlying the concept of public policy plainly does not overpower. Characterising its previous case law as intended to distance the concept from any particular connecting factor seems an *ex post facto* attempt to explain away past vacillations in dealing with the question.¹⁷ Moreover, the Supreme Court's functional explanation does no more than declare what the concept of public policy is not designed to achieve, ie not to protect the Swiss legal order and not to police how an arbitration award deals with foreign substantive laws, even mandatory ones.

Conspicuously, the Supreme Court neglects decisively to articulate the positive purpose to which public policy review is harnessed, and why such a purpose conditions the source of public policy values, as Swiss, international, or the particular hybrid of the two, which the Supreme Court enunciates in this case.

Elsewhere in this judgment and on previous occasions, the Supreme Court had explained that Article 190(2)(e) of the PIL Act serves as a reserve clause seeking to "protect fundamental and widely recognised values".¹⁸ One might, however, observe that such a purpose overlaps extensively with the protection of the Swiss legal order and with the enforcement of foreign substantive laws of sufficient importance.

The notion of "reserve clause" is a reference to so-called "negative public policy", limited to removing offending elements of the result of adjudications. This notion excludes the substitution of different elements of results, in application of relevant norms of the forum (so-called "positive public policy"). The supposed distinction between negative and positive public policy is, however, illusory in practice. Although the remedy that the Supreme Court imposes for the incompatibility of an award with public policy is its invalidation, any re-arbitration of the subject of the award will necessarily take into account the values which this invalidation seeks to vindicate. Public policy review may not dictate a specific result in substitution, but it does dictate that the result cannot be that in the impugned award. This can be seen not only as protection of the Swiss legal order but also the enforcement of laws, more specifically, core values expressed by them.

It is true that the operation of public policy is to test for compatibility with values, and not with the particularities of legal norms. Yet no one supposes that the role of public policy review is the strict censure of the misapplication of manda-

¹⁷ These vacillations are, however, excusable in view of the elusive nature of the concept of public policy. See François Knoepfler, "Droit de la concurrence et réserve de l'ordre public en arbitrage" in *Concurrences* 3-2006/16, at p 17.

¹⁸ See case cited in note 382 above, consid. 2.2.1., at p 527 of the ASA Bulletin.

tory norms. Indeed, the very exercise of arbitrators' treatment of mandatory norms is not applying them but, at most, giving effect to them, as epitomised in Article 7(2) of the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations (the Rome Convention). The exercise, of course, reduces to an assessment of the importance of the values behind the mandatory norm, vis-à-vis other interests. Courts reviewing arbitration awards for compatibility with public policy are certainly not held to a higher standard.

In fact, the solution that commends itself is to have the public policy control correspond to the mandatory norms exercise undertaken by the arbitrator. The consequence of dissonance between the two, where the individual application of the review standard falls too far short of the requirements on arbitrators, is that the latter requirements become a *lex imperfecta*, a requirement whose non-fulfilment attracts no adverse consequence. As seen above, in this judgment the Supreme Court is happy to accept such a position, maintaining, somewhat mysteriously, that public policy weighing upon the arbitrator is different from that to be employed by the reviewing court.¹⁹ That proposition finds no authority in the Supreme Court's previous case law,²⁰ despite the Supreme Court's statement to the contrary. Besides, the Supreme Court has not attempted to explain why any such distinction should operate in this context.

Finally, it is worthwhile noting that one cannot mistake the similarities between the Supreme Court's definition of public policy values and that of France's international public policy.²¹ In France, public policy is delimited first by deeply held values in France, which, additionally, are commonly found deeply held outside of France as well.²² In Switzerland, public policy values are those which are found widely in the world which Switzerland holds deeply. If there is a material difference, it would appear to be that the Swiss formulation may be more stringent than

¹⁹ See case cited in note 382 above, consid. 3.3., at pp 532–533 of the ASA Bulletin.

²⁰ P Landolt, article cit. in note 382 above, at p 544.

²¹ Article 1504 of the French New Code of Civil Procedure provides that “[a]n arbitral award made in France in an international arbitration may be the subject of an action to set aside in the cases designated in Article 1502.” Article 1502 5° of the French New Code of Civil Procedure stipulates that such a case is where the award is “contrary to international public policy”.

²² E Gaillard and J Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, (Kluwer Law International: The Hague 1999) at p 960: “For an award to be set aside or refused enforcement, its actual result must be contrary to the fundamental convictions of French law applicable in an international context [...]”. Poudret and Besson would seem to agree with this correspondence between the Swiss concept of public policy and the French concept. They describe the French concept in the same terms as the Swiss Supreme Court described the Swiss concept in the *Westland* case (cit. in note 387 above, consid. 6a, at p 167): “L’ordre public de l’art. 1502 ch 5 NCPC est international par sa fonction, en ce sens qu’il s’applique aux sentences en matière internationale ou étrangères, mais français par son fondement.” (“The concept of ordre public underlying Art 1502 of chapter 5 of the new Civil Procedure Code is international in terms of the ambit of its application, in the sense that it applies to awards on international and foreign subject-matters, but French in terms of its origin and foundation.”; editor’s translation) See J-F Poudret and S Besson, *Droit compare de l’arbitrage international* (Schulthess Médias Juridiques SA: Zurich – Basle – Geneva 2002), at p 808.

the French test: values which form *the foundation* of any legal order, whether from the Swiss perspective or any other, must be of rare importance. The Court's application of its formulation in the instant case would seem vividly to demonstrate the extreme difficulty of admission into the category of public policy values as far as Switzerland is concerned.

5.2. *Compatibility with Competition Law not Assurable by Public Policy Review*

Competition law is found extremely widely around the globe. Over 100 States have a system of competition law.²³ While it is true that the existence of competition law is generally predicated on a State's having a liberal economy, the vast majority of States do in fact have economies with markets sufficiently free for competition law to be a functional necessity. Where a State does not (yet) have competition law, this is generally because it has not (yet) achieved a sufficient level of economic and regulatory sophistication, and not because of any principled opposition to competition law.²⁴ The crucial point is, however, that the existence of a liberal economy makes competition law a necessity²⁵ as surely as a high-tackle rule is necessary to a game like rugby or an off-side rule to soccer. The proper field for determining whether competition law is sufficiently prevalent is not every country on the globe, but those which have liberal economies to any meaningful degree. It is a combination of the great prevalence of liberal economies and the pressing need for competition law in such economies which ought to be relevant to the test. Incidentally, Switzerland itself has such an economy, and therefore competition law should satisfy the Swiss aspect of the test.

Equally, competition law is capable of meeting any reasonable qualitative test for admission into this circle. The incidence of criminalisation of competition law violations is increasing²⁶, and even mere "administrative" fines can be swinging. The case of Switzerland itself illustrates the point vividly. In connection with the 2004 overhaul of the Swiss Competition Act of 6 October 1995, criminalisation of certain violations was extensively debated, albeit finally rejected.²⁷ Still, under new Article 49a(1) of the Swiss Competition Act, fines for violations of competition law may reach 10% of the offending undertaking's turnover in Switzerland *for the previous three years*.²⁸

²³ International Competition Network, *A Statement of Mission and Achievements up until May-2005*.

²⁴ P Landolt, article cit. in note 382 above, at 545.

²⁵ P Landolt, article cit. in note 382 above, at 545–546.

²⁶ International Competition Network, report cit. in note 404, at p 7.

²⁷ P Krauskopf and C Pirlot Pittet, "La nouvelle loi sur les cartels: un vade-mecum pour les entreprises", in *SIC* 2004/242.

²⁸ See P Landolt, *Modernised EC Competition Law in International Arbitration* (Kluwer Law International: The Hague 2006), at p 151.

At all events, one regrets the suggestion in this case that to be worthy of public policy protection a value must assume an “ethical” or “moral” aspect. It is not necessary for values to be of first order importance that they display an ethical hue. Ethical values might make up the first, and perhaps most obvious category of values comprising public policy, but there are others with sound claims to qualify. In fact, most economic regulation, much of which States may consider of primordial importance, cannot be said to derive from moral principles. Moreover, restricting public policy values to those ethical, would appear to depart from the broader approach accepted internationally. The International Law Association’s *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards* considered what sub-categories there may exist of values comprising public policy and concluded as follows:

The international public policy of any State includes: (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as ‘lois de police’ or ‘public policy rules’; and (iii) the duty of the State to respect its obligations towards other States or international organisations.²⁹

Nonetheless, fairly exceptional among economic regulations, competition law may actually be considered to disclose a moral aspect. In the United States it is commonly treated as the moral equivalent of laws against theft.³⁰ Even if one has not been exposed to the epistemological effort which in the United States has lifted competition law to such status, and is therefore sceptical of it, one cannot mistake certain features in competition law objectively justifying this status. For example, as with theft, the result of competition law violations is an enrichment enjoyed by the violator, and corresponding impoverishment suffered by its victims. Indeed, two exacerbating factors in relation to competition law, which one does not find with mere theft (except perhaps as relates to “theft” of intellectual property), are that victims are often legion, and not individual, with corresponding increase in scale of enrichment, and it is notoriously difficult to detect (and indeed prosecute) a violation of competition law – offenders are sophisticated and they can commit their violations at a distance under the guise of ordinary business relations.

Lastly, the Court’s view that no sufficiently clear and universally accepted principles can be derived in the competition law field seems unjustified. Practically

²⁹ *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards* by the Committee on International Commercial Arbitration of the International Law Association, presented at the 2002 New Delhi Conference, Professor P Mayer, chairman, A Sheppard, rapporteur, Recommendation 1(d).

³⁰ See, for example, the views of Assistant Attorney General Joel Klein at the 6 April 2000 ABA conference: “Price fixing is a flat out fraud on consumers and businesses. It is nothing more than theft, by well-dressed thieves and should be met with unequivocal public condemnation”.

all systems of competition law around the world agree on a group of violations of particular perniciousness, so-called hard-core violations. Perhaps the only point of divergence here relates to whether vertical resale price maintenance should be considered a hard-core violation and if so, in what circumstances.³¹ Swiss competition law itself has since 2000 been “ineluctably moving” towards convergence with EC competition law.³² “[T]oday there no longer exists, in the area of competition law and in particular in relation to the control of horizontal ‘hard-core’ agreements, any appreciable difference between Community law and Swiss law.”³³

The inadequacy of these arguments invoked by the Supreme Court is perhaps most vividly seen when competition law is compared with values the violation of which the Supreme Court accepts as justifying public policy annulment: “contractual good faith, respect for the rules of good faith, the prohibition against the abuse of right, the prohibition against discriminatory or expropriative measures, as well as the protection of persons under legal disability”.³⁴ It is doubtful that these are more prevalent in the world than competition law, that there is less variation in their treatment found in legal systems around the globe, and that the principles composing them are more discernable than the principles in competition law. What is more, they are a colony of Lilliputians, not the values which most immediately spring to mind as “fundamental”. Indeed, one expects that a proper acceptance of “public policy” will not be irretrievably estranged from that which may be “public”. Although private injuries sufficiently grave may assume public significance, there is very little intrinsically of public interest in the violation of most of these principles, especially in pecuniary matters, which all arbitration in Switzerland is by definition limited to.³⁵ This must be contrasted trenchantly and axiomatically with competition law.

Nonetheless, one readily sympathises with the Supreme Court’s practical concern about having to review arbitration awards for compliance with foreign legal norms and in particular EU law and EC competition law. The question may legitimately be asked what ensures that the Swiss Supreme Court’s view of these matters will, as a rule, be more accurate than that of arbitral tribunals? One of the principal

³¹ P Landolt, article cit. in note 382 above, at p 546.

³² B Merkt, “Ordre public et droit public de la concurrence: ‘Utopie’ ou réalité?” in *Concurrences* 3–2006/21, at p 23, and references cited there. This fact makes it particularly regrettable that the Supreme Court supports its proposition to the contrary upon Poudret and Besson, current as of “Autumn 2001”. Case cited in note 382 above, consid. 3.1., at p 530 of the ASA Bulletin. See J-F Poudret and S Besson, op cit in note 403 at 650: “Ces différences entre les diverses réglementations de la concurrence sont effectivement trop marquées – notamment entre la Suisse et l’Union européenne – pour que l’on puisse y voir une règle transnationale ou d’ordre public international.” (“These differences between the various regulations of competition are, in actual fact, too stark – in particular between Switzerland and the European Union – for identifying among them a transnational rule or rule of international public policy.”; editor’s translation)

³³ B Merkt, op cit in note 413 above, 21 at p 23.

³⁴ See case cited in note 382 above, consid 2.2.1., at p 527 of the ASA Bulletin.

³⁵ Article 177(1) of the PIL Act.

factors in reference to which parties choose arbitrators is familiarity with, indeed expertise in the substantive law.³⁶

Moreover, whatever the ECJ ultimately decides in connection with the competing values of EU Member State procedural autonomy in reviewing arbitration awards, and the equivalent and effective enforcement of EU law expressed in arbitration awards, under no circumstances can full, *de novo* consideration by courts of the featured book arbitration awards be envisioned. So arbitral tribunals will always have the advantage over reviewing courts of having seen and heard all of the evidence.

In addition, it must be frankly acknowledged that the EU legal order has failed distinctly to proclaim that it actually requires EC competition law to be applied by arbitral tribunals, in particular those sitting outside of the EU. The Commission's *White Paper on the Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty* (as they then were) of 28 April 1999 utters not a word about arbitration, even though one of its central thrusts is the enhancement of the private implementation of EC competition law. The Commission's *Green Paper on Damages Actions for Breach of the EC Antitrust Rules* of 19 December 2005³⁷ is equally silent as to the role of arbitration in dealing with such claims for damages. Indeed the Commission has made *no* public statement in connection with arbitration and EC competition law. As for the ECJ, it does not treat arbitral tribunals, even those sitting within the EU territory, as having the status of a "court or tribunal of a Member State" for the purposes of Article 234 EC preliminary references.³⁸

Moreover, as the Swiss Supreme Court pointed out in the judgment under review, the EU legal order has failed to enunciate unequivocally that its norms are of mandatory application, for example in accordance with the criterion of its own legal instrument, the Rome Convention, and in particular Article 7 of that Convention, i.e. "rules which must be applied whatever the law applicable to the contract." With EU law the confusion, of course, arises in that the ECJ only ever discusses whether EU Member State courts must apply EU law, and not courts of other jurisdictions and arbitral tribunals. EU Member State courts are under an obligation flowing from Article 10 EC to apply EU law faithfully. Since this reasoning is specific to EU

³⁶ Even though the application of competition law is not simply a matter of ascertaining the *lex causae*, which can usually be accomplished by glancing at the parties' contract, parties enjoy sufficient predictability over its potential application at the time of selecting arbitrators. Moreover, there is a sufficient degree of likelihood that EC competition law will be applied by arbitrators sitting in Switzerland in accordance with its demands for parties to wish to select arbitrators having expertise in EC competition law. The claims of the EU legal order as to conformity of awards with EC competition law, as enunciated in *Eco Swiss*, are sufficiently widely-known, and Swiss law treats an arbitral tribunal's failure to consider competition law when so requested by a party to be a misassessment of jurisdiction.

³⁷ COM (2005) 672.

³⁸ Case 102/81 – *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co KG*, [1982] ECR 1095; Case C-125/04, *Denuit and Cordenier v Transorient-Mosäïque Voyages and Culture SA*, Judgment of 27 January 2005.

Member State courts no principle can be extended to these other instances. Moreover, where the ECJ finds that Member State national law provisions must yield to EU law, this does not necessarily depend on the latter being “mandatory norms”, as this term is understood under the Rome Convention, but rather usually results from the hierarchy of norms within Member State law, as imposed by EU law. Indeed, the ECJ has until very recently entirely eschewed all mention of the potential “mandatory” character of EU law.³⁹ Non-EU Member State courts reviewing arbitration awards at the annulment stage cannot be bound to ensure compliance with EU law in the absence of any unequivocal statement from the EU legal order that it wishes them to do so.

5.3. *What Might this Judgment Herald for the Future?*

The most prominent note in this judgment is that the Supreme Court is conclusively confirming its previous case law and conclusively putting to rest all aspirations towards the inclusion of competition law among the set of values relevant to the public policy analysis. Yet the lack of cogency in the Supreme Court’s reasoning in this judgment favouring such a limited conception of public policy paradoxically drowns out this intended message and stokes previously smouldering debate.⁴⁰

The Supreme Court is doubtless right to treat gingerly the prospect of embroiling itself in complex and involved review of arbitration awards, in particular of the factual findings upon which they are based. This presents enormous challenges to the efficiency of arbitration as a dispute settlement process. It also would make significant claims upon the public purse and the Supreme Court’s limited time. In this relation, competition law, with its dependence on market phenomena, raises a particularly fearsome spectre for a reviewing court. In all fairness too, the European legal order has itself not been more intrepid in thrashing out a solution to this nettlesome problem. *Eco Swiss* is perhaps the only case relevant on the point, and it says very little if anything directly on standards of review required of Member State courts.

³⁹ See, however, C-168/05 – *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, Judgment of 26 October 2006, not yet reported, at paragraph 36: “This is a mandatory provision which, taking into account the weaker position of one of the parties to the contract, aims to replace the formal balance which the latter establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them.” Here the ECJ uses the term “mandatory provision” in connection with a situation where parties cannot contract out. This latter consequence approaches the Article 7 Rome Convention test for mandatory rules, ie which apply no matter what the law otherwise applicable to the contract.

⁴⁰ See P Landolt, op cit in note 409 above, at pp 158–152; M Bowsher, “Arbitration and Competition” in T Ward & K Smith (eds), *Competition Litigation in the UK*, (Sweet & Maxwell London 2005), pp 398 *et seq.*, at p 421; C Baudenbacher, “Enforcement of EC and EEA Competition Rules By Arbitration Tribunals Inside and Outside the EU” in C-D Ehlermann and I Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Hart Publishing: Oxford 2003), at pp 341 *et seq.*

Despite the similarity of the French and Swiss tests, it must also be conceded that no universal or internationalist criteria exist upon which legislators and courts may obtain direction in fashioning the public policy concept. The New York Convention does not cover review upon annulment (except indirectly), and for enforcement it refers courts to the concept of public policy in their own country.⁴¹

The PIL Act is to be lauded for its courage in insulating international arbitration from what would doubtless otherwise be noisome albeit well-meaning interference from the courts of the Swiss seat. Article 192(2) of the PIL Act is emblematic of this courage. Where the parties have no significant attachment to Switzerland, they may, by express agreement, exclude any annulment action. The Swiss Supreme Court is equally to be praised for its faithful expression of the legislator's intention to proscribe interference with arbitral proceedings located in Switzerland, and in particular, to respect parties' exclusion of challenges to awards upon the fulfilment of the conditions laid down for this.

Equally, the PIL Act and the Supreme Court's interpretation of it have been concerned to vindicate the value of finality of arbitration awards, a value of exceptional importance. The difficulty is that in achieving this objective, the Supreme Court has not succeeded in expounding a convincing basis upon which to isolate the rare cases where control of arbitration awards must genuinely be imposed.

The impression, one regrets, is that the outcome of the case under examination was end-driven, dictated by a desire to avoid opening up public policy review too broadly, especially where doing so might entail much unattractive sifting through complex evidence.

Indeed two judgments handed down by the Supreme Court on 17 July 2006 in relation to the exclusion of appeals from court decisions would seem to confirm such fears.⁴² Unlike with Article 192(2) of the PIL Act in which the possibility of exclusion of challenges to an arbitration award is expressly provided for, Swiss statute is silent on the matter of exclusions of appeals against judicial decisions. Nonetheless, the Supreme Court adopted an astoundingly low test for such exclusions, and accepted them startlingly broadly.

Again, the Supreme Court's accepted incidences of substantive public policy violations – contractual good faith, respect for the rules of good faith, the prohibition of abuse of right, etc. – especially as interpreted by the Supreme Court, all have the merit of being assessable upon the face of the arbitration award, even if, as is permitted in certain circumstances in Switzerland⁴³, the award contains no reasoning.⁴⁴ It is, of course, not satisfactory to fashion a concept of public policy as a function of a desire to perform only minimalist review.

⁴¹ Article V(2)(e) of the New York Convention.

⁴² Judgment of 17 July 2006, 4C.202/2005; Judgment of 17 July 2006, 4P.110/2006.

⁴³ Article 189(2) of the PIL Act.

⁴⁴ For instance, the Supreme Court's test for a violation of the principle of contractual good faith (*pacta sunt servanda*) is confined to impugning internal contradictions in an award, where the arbitral tribunal accepts the existence of an obligation (which it is free to do or not to do – the Supreme Court

As regards the specific case of competition law, and how it should be treated under a fully developed public policy concept, this judgment is decidedly not the final word either. Competition law and practice have, of course, become of utmost sophistication and seriousness in Switzerland. Today, competition law is systematically and effectively enforced in Switzerland by authorities with considerable powers of investigation and under the threat of severe punishment for non-compliance. It is true, however, that this climate has taken hold relatively recently, and may still be unfamiliar to judicial instances other than those specifically tasked with contending with it. At all events, the general movement towards the establishment of a “competition culture” continues in Switzerland as it does in the European Union, in both old Member States and new. Consequently, seen dynamically, if competition law values are not viewed today as being sufficiently weighty to merit public policy protection, they may well graduate to that status in the future.

6. Conclusion

The task before the Supreme Court remains the cogent articulation of a principle upon which to identify a tightly circumscribed class of cases deserving of public policy policing by the Swiss court at the seat of the arbitration. That will lead ineluctably to the inclusion of competition law within that principle. What is past is prologue. With this judgment issue is now joined and the debate will begin in earnest.

7. Epilogue

7.1. Background

The claimant in the arbitration, successful in defending against annulment before the Swiss courts, brought enforcement proceedings before the courts in Milan, Italy. The final decision in these enforcement proceedings is a decision of 5 July 2006 by the First Civil Section of the Milan Court of Appeal.

From this decision one learns a number of facts about the parties, the facts giving rise to the dispute, the respondent’s arguments in the arbitration in relation to competition law, and the arbitral tribunal’s reasoning in rejecting these arguments. This decision also presents the Milan Court of Appeal’s view of the intensity of review of treatment of EC competition law in arbitral awards. It is very different from that adopted by the Paris Court of Appeal in the *Thalès* case.⁴⁵

will not interfere with this determination) and then fails to follow through with legal effects of that obligation. Where the award contains no reasons this ground simply falls away. Where there are no reasons there can be no internal contradiction of this sort.

⁴⁵ Judgment cit. in note 396.

7.2. Further Facts of this Case Revealed

The claimant in the arbitration was Terra Armata, formerly Freyssinet Terra Armata, an Italian company which was, at least at the time of the facts underlying the arbitration, a member of a large, international construction group. The respondent in the arbitration was Tensacciai, a large Italian construction interest. Both companies are indeed specialised in, among other things, stay cables and pre-tensioning systems, the subject of the tenders which gave rise to the dispute.

As recited in the Swiss Supreme Court's judgment of 8 March 2006, in May 1998, these companies entered into a contract titled "Preliminary Association Agreement" providing for joint tenders. Among other things, the agreement stipulated a prohibition on the parties tendering for the defined works except with each other. Tensacciai progressively distanced itself from the association with Terra Armata, and ultimately entered into four contracts for the supply of works without Terra Armata.

In the arbitration, Tensacciai argued that the agreement was void as in violation of Italian and EC competition law. The exclusivity clause had, in reality, the object and effect of limiting competition both between the parties and as between other potential competitors. It alleged that Terra Armata, the world leader in the relevant sector, sought to share the market out by manipulating the calls for tenders in circumstances where both parties had the technical and financial capacity to carry out the works alone. Proof of the anti-competitive nature of Terra Armata's conduct was allegedly that the works for stays on the Milan-Bologna segment were, in fact, parcelled out to two groups composed of the five largest companies in the sector. The agreement was not based on economic necessity but only on the convenience of the parties. Tensacciai contended that the relevant market definition suggested by decisions of the Italian competition authority (l'Autorità Garante della Concorrenza e del Mercato) should not be followed. Rather, the relevant market, an exceedingly narrow one, was that for the bridges over the River Po and the Piacenza Viaduct, that is, it was limited to the actual calls for tenders.

The treatment in this award of the competition law issues arising from these arguments proceeded as follows. The arbitral tribunal initiated its objects analysis by defining the relevant market with reference to relevant decisions of the Commission and the Autorità. The arbitral award then presented a "careful and incontestable" reconstruction of the relevant facts concerning the calls for tenders and the behaviour of the parties and the other participants. The award then assessed in detail the various arguments of the parties before concluding that the relevant market was an Italian market for large construction works, or possibly large railway works, and not limited to the calls for tenders under the agreement. The arbitral tribunal did not follow two decisions of the Autorità, which it distinguished. It followed others. It explained in detail why it rejected Tensacciai's narrow market definition, with reference to specific and in-depth technical matters and evidence in oral testimony.

With reference to the market so defined, it assessed whether the object of the agreement was anti-competitive. The arbitral tribunal pronounced that such an object would be present where the agreement was not consistent with the overcoming of barriers constituted by the scope and technical requirements of the works. The arbitral tribunal then described the absolutely exceptional nature of the works as well as the technical capacities of the parties. It noted in particular that Terra Armata had already obtained positive tests in relation to the application of its technology on cable stay bridges, that Tensacciai had already tested the electric insulation for the pre-tensioning, and that the projects consisted of three enormous viaducts entailing pre-tensioning works of a scale never before attempted. It concluded that the object of the agreement was consonant with economic rationality.

As for anti-competitive effects, the arbitral tribunal found that Tensacciai had not provided sufficient proof that the agreement resulted in an increase in the barriers faced by competitors to participate in future calls for tenders for similar works. Moreover, Tensacciai had not proved the existence of any broader, covert agreement between Terra Armata and other competitors to divide between themselves the market for large railway works in Italy. The arbitral tribunal based this latter conclusion on an evaluation of facts flowing from documents produced and witnesses heard.

7.3. *The Decision of the Milan Court of Appeal*

The First Civil Section of the Milan Court of Appeal declared the arbitration award enforceable in Italy.⁴⁶ The first part of the judgment is devoted to confirming its former case law that competition law is an arbitrable matter as far as Italy is concerned.

The second part, of interest here, is the response to the plea that “the arbitrators failed to apply or to apply properly or contradicted principles or criteria of Community or Italian antitrust law, constituting [...] norms of ‘economic public order’, in view in particular of the current constitutional protection of the values underlying competition”.⁴⁷ The Court held that its task was to examine the logic and the legal foundations of the arbitral award, but not its substantive correctness in the sense of a review for error of law.⁴⁸ The standard of review it proceeded upon was that the award must exhibit that the arbitral tribunal “accepted and declared principles and criteria which are not opposed to or incompatible with but rather on the whole are in conformity with Italian antitrust law, in particular the specific national case law developed on the subject.”⁴⁹ The Court expressly adverted to the award’s

⁴⁶ Judgment 1897/06 of 5 July 2006 in Case no 4209/2005 r.g., *Terra Armata (già Freyssinet Terra Armata) s.r.l. v Tensacciai s.p.a.*

⁴⁷ Judgment cit. in note 427, at p 7.

⁴⁸ Judgment cit. in note 427, at p 7: “[I]’esame del lodo – del suo percorso logico e dei suoi fondamenti giuridici, non certo del merito della decisione [...]”.

⁴⁹ This statement was made in the specific context of market definition, but clearly applies as a

having met this standard in connection with the relevant market assessment and the objects assessment. It is equally significant that the court found that the level of detail of the progression of the reasoning in the award clearly demonstrates the correctness of the legal principles followed by the arbitrators and therefore, *a fortiori*, the absence of any incompatibility with public policy.

This standard of review differs starkly from that applied by the Paris Court of Appeal in the *Thalès* case.⁵⁰ In *Thalès*, the Court declared that it would only set aside an arbitral award for incompatibility with EC competition law if there was a “flagrant, effective and concrete” violation on the face of the award. The standard enunciated by the Milan Court of Appeal is much higher. It has the effect of requiring the award to provide sufficient reasoning, basing itself on a high enough level of detail, for the court to be able to satisfy itself that the arbitral tribunal followed the relevant competition law principles and applied them diligently. The *Thalès* standard creates the danger that arbitrators may successfully avoid review of what they do with EC competition law in their awards by providing little or no account of that on the face of their award.

It is submitted that the Milan Court of Appeal’s approach obviates this problem, and is in fact more consistent with the responsibility of EU Member State courts under *Eco Swiss* to test arbitration awards for their compliance with EC competition law. It is to be regretted that the Milan Court of Appeal did not seek the opinion of the ECJ on the matter of the intensity of review required, but it would be not at all surprising if the answer to any such query in a future case confirmed the correctness of the Milan Court of Appeal’s approach.⁵¹

The Court’s specific treatment of the various determinations in the arbitral award is also worthy of mention. The Court approved the arbitral tribunal’s view that it must first examine whether the agreement had an anti-competitive object within the actual economic context, and, if not, proceed to examine whether the effects of the agreement were anti-competitive. The Court approved the arbitral tribunal’s conclusion as to market definition. The Court held that it was no ground to interfere with the award that the arbitrators rejected certain decisions of the Autorità, in preference for other such decisions, since in doing so the arbitrators adequately distinguished the decisions not followed. The Court declined to interfere with the arbitral tribunal’s finding that the agreement in its economic context disclosed no anti-competitive object, in view of the evidence of technical and economic advantages of the co-operation, indicated above. The Court also agreed that

more general standard. See judgment cit. in note 427, at p 9: “Ciò che conta per escludere qualsiasi violazione dell’ordine pubblico nel senso sopra illustrato è che [...] il lodo [...] abbia assunto e dichiarato principi e criteri (non opposti od incompatibili, ma anzi) del tutto conformi alla disciplina antitrust italiana (et addirittura a specifica giurisprudenza nazionale formatasi su tema.”

⁵⁰ Judgment cit. in note 396.

⁵¹ See P Landolt, op cit in note 409 above, at pp 200–206 for a consideration of the intensity of review problem, critical of the approach of the Paris Court of Appeal in *Thalès*, and arguing for an approach along the lines of that employed by the Milan Court of Appeal.

it was for Tensacciai, the party asserting the anti-competitive effect of the agreement, to prove any anti-competitive effect. The Court found that the arbitral tribunal was in fact correct in holding that Tensacciai had failed to discharge its burden of proving that this agreement would create barriers to competitors winning future calls for tenders for similar work and that this agreement was the manifestation of a broader, covert agreement among competitors to divide up the market. The Court was careful to note that since the arbitral award was correct on this matter, *a fortiori* the award was not in violation of public policy. The reviewing court's role is not to ensure the correctness of the award – that would be review for error of law – but rather that the award meets the lower standard enunciated by the Court and discussed above.

