



Arbitration Newsletter Switzerland

Swiss Federal Supreme Court: "European Competition Law is not Part of the Public Policy"

Facts

Two Italian companies, Tensacria S.P.A. ("Tensacria") and Freyssinet Terra Armata R.L. ("Freyssinet"), entered into an agreement for the supply of tether and cable to be used in the constructions for a new fast track line between Milan and Naples. The understanding was that the two companies should neither bid with third parties nor individually. But it was only Tensacria who at the end won the contract. Freyssinet then filed a claim at an ICC arbitration tribunal having its seat in Geneva, as provided for in the agreement, asking for damages for an alleged breach of contract. The agreement stipulated Italian law to apply. Tensacria argued that the terms of the agreement were incompatible with Italian and EC-Competition Law. The arbitration tribunal then rendered an award, obliging Tensacria to pay EUR 488'258 to Freyssinet for breach of contract. In rendering such award, the arbitral tribunal concluded that the parties were bound to this agreement also under Italian law and EC- Competition Law.

Action for Annulment

Tensacria then filed an action for annulment at the Supreme Court based on Art. 190 (2) (e) PILA, arguing that the award rendered was incompatible with Swiss public policy since it disregarded fundamental principles of European and Italian competition law.

Arguments of the Supreme Court

The Supreme Court rejected the action for annulment. The Supreme Court took the opportunity and proceeded with a detailed analysis of the term public policy ("ordre public") and revisited some of its previous decisions rendered in this field. In doing so, it went back to its leading case of UAE vs. Westland Helicopters Ltd. (BGE 120 II 155) and confirmed the

principle established therein. In doing so, the Supreme Court stated again that public policy, almost by definition, is a rather general term, not easy accessible to a precise definition. Looking at the provision of Art. 190 (2) (e) PILA the Supreme Court did not find fault in the lacking of a precise definition of the term "public policy" since the result would, in any case, be clear, namely:

"It should be clear by now that, whoever is going to enter into an arbitration agreement leading to the application of Art. 176 et seq. PILA that its chances for success are extremely marginal once he decides to challenge an award based on Art. 190 (2) (e) PILA." (unofficial translation).

In its further, rather academic reasoning the Supreme Court then came up with two definitions for the procedural public policy and substantive public policy, namely:

"...there is violation of public procedural policy if fundamental principles which are generally recognised, have been violated, which leads to an unsupportable contradiction in the sense of justice, so that the decision appears incompatible with the values recognised in a state of law." (unofficial translation)

"An award is against the material public policy when it violates the principles of fundamental rights and, thus, is not anymore reconcilable with the legal order and the system of determinant values; including contractual fidelity, respect of the rules of good faith, the prohibition of abuse of rights, discriminating and expropriating measures and the protection of persons incapable of action." (unofficial translation)

The Supreme Court then concluded its academic tour d'horizon with the following general definition:



"This short overview of public policy shows, once again, that it is almost undefined. Supposing that there is a need to formulate a definition, one could say that an award is incompatible with public policy if it ignores the essential and widely recognised values which, in accordance to the conceptions prevailing in Switzerland, should constitute the basis of any legal system." (unofficial translation)

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The last sentence is particularly noteworthy since it contains a restriction to the conceptions prevailing in Switzerland.

Bearing in mind this restriction, the Supreme Court analysed the term competition law. It recognised that anti-trust provisions are "un des chevaux de batailles de l'union" but it also concluded that such provisions are not recognised on a world wide basis and not even in Switzerland, where Art. 5 (2) (a) of the Law on Cartels allows, under certain conditions, competitive arrangements. Whilst the Federal Supreme Court acknowledges that, according to the EC Court, Art. 81 CE is part of the EC public policy, it reminded at the same time that it expressed already at two occasions its doubts that a violation of anti-trust provisions on European or national level is to be considered as being against public policy (BGE 128 III 234 (4P.226/2001) and 4P 119/1998, published in ASA 1999 p. 529 *et seq.*) and then concludes:

"The Supreme Court holds that there is no doubt that anti-trust provisions, however they might be, are not part of the fundamental and widely recognised values, which in accordance to the conceptions prevailing in Switzerland, should constitute the basis of any legal system." (unofficial translation)

Consequently the Supreme Court rejected the action for annulment:

"Considering the fact that neither European nor Italian competition law is part of the public policy, as addressed Art. 190 (2) (e) PILA, the present action for annulment is to be rejected without having to review in which way the Law has been applied by the arbitral tribunal." (unofficial translation)

In the meantime Charles Poncet, Geneva, has prepared an English translation of the entire decision of the Supreme Court which you find on www.praetor.ch.