

Stockholm International Arbitration Review



2007:2

ARBITRATION INSTITUTE

OF THE STOCKHOLM CHAMBER OF COMMERCE

JURISNET, LLC.
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SNF V CYTEC INDUSTRIE: NATIONAL COURTS WITHIN THE EC APPLY DIFFERENT STANDARDS TO REVIEW INTERNATIONAL AWARDS ALLEGEDLY CONTRARY TO ARTICLE 81 EC

*Pierre Heitzmann and Jacob Grierson**

1. Introduction

Since the decision of the European Court of Justice in *Eco Swiss China vs. Benetton International* case (“**Eco Swiss**”)¹ and the *Thalès vs. Euromissile* case (“**Thalès**”) decision rendered by the Paris Court of Appeal, there has been a controversy among arbitration practitioners and scholars about the degree and scope of review of awards deciding EU competition law issues.²

In two recent decisions rendered in France and in Belgium (which are still subject to appellate proceedings in both jurisdictions), the courts applied different standards to review the same award (the “**SNF award**”), and thus reached radically different results: while the recognition and enforcement of that award was granted in France in March 2006 (the

* Pierre Heitzmann is a partner at Jones Day. Jacob Grierson is a European Counsel at Jones Day. They wish to thank Laurence Marquis of Jones Day and Benoît Champon for their assistance in researching this article and in translating the SNF v Cytec Industries cases.

¹ European Court of Justice, July 1, 1999, *Eco Swiss China Time Ltd v. Benetton International NV* (1999), Case C-126/97, available on the EU’s website europa.eu.int and reported at 1 ECR I-3055 and [1999] 2 All ER (Comm). See also Stockholm Arb Report 2000:1 p 23 (“the Eco Swiss v Benetton decision”).

² See P. Senkovic and P. Lastenouse, *International Arbitration and Antitrust Law: Eco Swiss Judgment Revisited* by the Paris Court of Appeal, *Mealeys Int’l Arb. Rep.*, Vol 20 #2 (February 2005); L. G. Radicati di Brozolo, *L’illicéité qui crève les yeux: critère du contrôle des sentences au regard de l’ordre public international*, 2005 Rev. arb. 529; A. Mourre, *JDI Clunet* 2005, p. 357; G. Chabot, *Articulation entre Droit Communautaire de la Concurrence et Arbitrage*, *JCP* 2005.II.10039; Ch. Seraglini, *L’affaire Thalès et le non-usage immodéré de l’exception d’ordre public (ou les dérèglements de la déréglementation)*, *Gaz. Pal.* 21-22 oct. 2005, p. 5 and commentary at *JCP* 2005.I.134 § 8; D. Bensaude, *Thalès Air Defence BV v. GIE Euromissile: Defining the Limits of Scrutiny of Awards Based on Alleged Violations of European Community Law*, *J. of Int’l. Arb.* 2005, p. 239; E. Loquin, *RTD com.* 2005.263; Cl. Lucas de Leyssac, *Arbitrage et Concurrence: retour sur Eco Swiss*, *Revue des droits de la concurrence*, 2005, n° 1, p. 1; Th. Clay, *D. 2005.Panorama*, cahier n° 44, Eric Barbier de La Serre et Cyril Nourissat, “*Contrôle des sentences arbitrales à l’aune du droit de la concurrence : à la recherche du bon équilibre...*”, *Revue Lamy de la Concurrence*, février/avril 2005, n°2, p. 68. See also *Stockholm Int. Arbitration Review* 2005:2 p 193 (“the Thalès v Euromissile decision”).

“**French SNF case**”),³ both that award and an earlier partial award were annulled in Belgium in March 2007 as being contrary to Article 81 EC (the “**Belgian SNF case**”).⁴

2. Background Facts

The arbitral awards recognized by the Paris Court of Appeal and annulled by the *Tribunal de première instance de Bruxelles* (the “**TPI**”) related to two long-term contracts for the supply of acrylamide (“**AMD**”) by Cytec, a Dutch company, to SNF, a French company. AMD, a chemical compound often used as a water-soluble thickener, is an essential raw material for products manufactured by SNF. The first supply contract (the “**1991 Contract**”) was entered into in 1991 and was to run until June 30, 1995, but was replaced by a second contract (the “**1993 Contract**”), which was concluded on October 1, 1993.

On January 10, 2000, at a time when SNF apparently no longer needed AMD from Cytec,⁵ SNF notified Cytec in writing that it considered the 1993 Contract to be contrary to Articles 81 of the EC Treaty, on the ground that the 1993 Contract was a concerted agreement effectively restricting competition. SNF also considered the 1993 Contract contrary to Article 82 of the EC Treaty, arguing that Cytec had abused of a dominant position. As a result, SNF requested termination of that contract.

In May 2000, Cytec started an ICC arbitration in Brussels, pursuant to the arbitration clause of the 1993 Contract, which provided for the arbitrators to “apply the *lex mercatoria* and in addition where necessary the appropriate law” (*i.e.*, French law, which was stated elsewhere to govern the contract).

3. Arbitral Awards

The arbitral tribunal (the “**Tribunal**”) rendered two awards: a partial award on liability, on November 5, 2002; and a final award on damages and interest, on July 28, 2004.

³ The decision is found under Court Decisions on Arbitration p. 99.

⁴ The decision is found under Court Decisions on Arbitration p. 79.

⁵ The Belgian SNF Case quoted the Arbitral Tribunal’s partial award “*The 1993 agreement was contravening to article 81 from the origin as its purpose was to prevent SNF from entering the AMD market for 8 years. Therefore, and with a certain reluctance on the majority’s side who considers that an unfair advantage may have been obtained by SNF in complaining about the said agreement at a time when it did not need to be supplied by CYTEC anymore, the Tribunal considers that the 1993 agreement is forbidden by article 81 (1) and has not been subject to an exemption pursuant to article 81 (3). The agreement is therefore null and void based on article 81 (2). The nullity deriving from contracts forbidden according to article 81 has a retroactive effect; the agreement is therefore void ab initio*” (p. 38)”, see translation of the Belgian SNF case quoting the partial award.

In the partial award, the Tribunal found that the 1993 Contract was indeed contrary to Article 81 of the EC Treaty, because its object had been to prevent SNF from entering the AMD market and therefore to restrict competition.⁶ The Tribunal went on to find that both Cytec and SNF knew, or should have known, that the 1993 contract was null and should therefore equally share responsibility, and that each of the parties was thus liable to the other for half of any damage suffered as a result of the nullity of the contract. In the case of SNF, the Tribunal held, this would require proof that it could have purchased AMD from third-parties at cheaper prices, or that the 1993 Contract as executed reduced SNF's competitiveness. Finally, the Tribunal found that there had been no evidence showing that Cytec abused a dominant position when concluding the 1993 contract.

In its final award, the Tribunal awarded Cytec damages of € 6,467,500 plus interest, relating to (a) the profits that Cytec would have made under the 1991 Contract if it had not been replaced by the 1993 Contract and (b) the higher European market prices that Cytec might have charged SNF absent the 1993 Contract. By contrast, the Tribunal awarded nothing to SNF. It found that SNF had not proven that it would have obtained better terms from Cytec or a third-party supplier than under the 1993 Contract.

SNF challenged the award (i) by filing an application to set aside both the partial and the final awards in Belgium, where the awards had been rendered, (ii) by challenging before the Paris Court of Appeals the recognition of the final award sought by Cytec in France, (iii) by writing directly to the Directorate General for Competition of the EC Commission about the alleged violations of antitrust laws as a result of the final award; and (iv) by filing criminal proceedings before French courts alleging violation of Articles L420-1 (prohibition of concerted actions, agreements, or undertakings intended to limit access to the market), L420-2 (prohibition of abuse of a dominant position) and L420-6 (criminal sanctions for violations for L420-1 and L420-2) of the French Commercial Code.

4. The French Proceedings

Cytec attempted to enforce the final award in France, but SNF challenged the enforcement proceedings before the French courts on a number of grounds, including that the agreement violated Articles 81 and 82 EC by awarding the allegedly dominant party, Cytec, more benefits through the annulment of the 1993 Contract than through its performance.

⁶ The tribunal held that, in assessing its damages, Cytec was entitled to rely on the 1991 Contract for the period 1993-1995 (*i.e.*, from the date when it was replaced by the 1993 Contract until the date at which it would otherwise have expired). Neither of the parties had argued that the 1991 Contract was contrary to Article 81.

On March 23, 2006, the Paris Court of Appeal rejected SNF's challenge. It gave particularly short shrift to the Article 82 argument. The Court of Appeal noted that the Tribunal had fully addressed the question whether the 1993 Contract infringed Articles 81 and 82, and had in fact found that it did infringe Article 81. SNF had asked the Tribunal for damages, the Tribunal had rejected this request, and, in the absence of a "flagrant, real and concrete violation of international public policy" there was no reason to substitute the Court of Appeal's view in place of the Tribunal's.⁷

When considering the standard of review of the award, the court held that "while it is true that under Article 1502 of the NCPC, the Court of Appeal exercises its power to review the complaint based on that article by seeking all elements related to one of the grounds of challenge, in fact and in law, without any limitation, with respect to the violation of international public policy, the Court exercises only an extrinsic review of the award since only the recognition or enforcement of the award is reviewed with respect to its compliance with international public policy at the time of its submission to the judge."

The Court also rejected SNF's request for a stay of the enforcement proceedings pending the resolution of the criminal proceedings that had been commenced by SNF after the issuance of the award.

5. The Belgian Proceedings

Meanwhile, SNF had in May 2005 applied to the TPI for annulment of the two awards. The application was made on the basis of the Tribunal's alleged breach of EC competition laws.

In respect of these, the TPI held, citing the ECJ's judgment in *Eco Swiss*, that:

"It is not for this court to rehear the merits of the case which was submitted to arbitration but rather to verify, by reading the award, whether:

- in its appreciation of the facts which have been presented to it (and regardless of the appreciation which this court might itself make of those facts, which could be quite different), and

⁷ A full translation of the Paris Court of Appeal's decision is attached. For commentary on the decision, see Heitzmann and Grierson, "The French Approach to Arbitrating EC Competition Law in the Light of the Paris Court of Appeal's Decision in *SNF v Cytec Industries*," in Zuberbühler and Oetiker, Practical Aspects of Arbitrating EC Competition Law (Schulthess, 2007).

- in its application of the law to those facts, such as they have been appreciated,

The Tribunal has or has not breached Articles 81 and 82 of the EC Treaty, which are [rules of public policy].”

Having laid down this standard of review, the TPI then went on to put it into practice in relation to the Tribunal’s awards.

In respect of Article 82, the TPI upheld the Tribunal’s finding that Cytec was not in a dominant position. Noticeably, it did so after a relatively detailed review of the relevant considerations that had led the Tribunal to reach that conclusion.

As to Article 81, on the other hand, the TPI found that the Tribunal’s reasoning was self-contradictory: it had found that the 1993 Contract restricted competition under Article 81 because of its excessive duration; and yet it found that, absent the 1993 Contract, SNF would in any case have purchased the same quantities of AMD from Cytec at higher prices. The TPI held that:

“To find, as the Tribunal did (albeit on the basis of declarations by the parties, including SNF), that *during the entire period*, SNF would necessarily have purchased from Cytec the same quantities as those specified in the 1993 Contract and at higher prices, amounts to denying the anti-competitive nature of that contract.”

Accordingly, the TPI found that the two awards were contrary to Article 81 “to the extent that, by the solution which they gave to the dispute, they amounted to giving effect to a contract which had been judged anti-competitive.”⁸

Interestingly, one of the members of the Tribunal, Hans van Houtte, had previously stated in an article published in 2005: “Awards that discourage parties to invoke the nullity of an agreement ex Art. 81 EC by refusing an appropriate remedy, may be considered in EU Member States in breach of public policy and risk thus to be annulled.”⁹

⁸ A full translation of the TPI’s judgment is attached. It is not clear why the TPI found the partial award, as opposed to the final award, contrary to Article 81. As explained above, the partial award had merely found that the 1993 Contract was contrary to Article 81 and had left the question of damages to be determined in the final award. See further below (“Analysis”).

⁹ “Arbitration and Arts. 81 and 82 EC Treaty – A State of Affairs” ASA Bulletin, Vol. 23 No. 3 (2005), pp. 431-448.

6. Analysis

The ECJ's decision in *Eco Swiss* makes it clear that a national court in the European Union must annul an arbitral award which infringes Article 81 "where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy."¹⁰

While this is well known and generally accepted by arbitration practitioners, what has been hotly contested since the *Eco Swiss* decision is the level of review that is required.¹¹ How far should a national court go in reviewing the merits of the relevant competition law issues in order to decide whether an award infringes Articles 81 and 82?

The judgments of the Paris Court of Appeal and the Brussels TPI in *SNF v Cytotec Industrie* represent very different answers to this fundamental question:

- The approach followed by French courts is now clear: French courts will exercise only an extrinsic review of the award since only the recognition or enforcement of the award is reviewed with respect to its compliance with international public policy when parties have raised the competition law arguments in the course of the arbitration itself (as in the SNF case).¹² In addition, French courts will not intervene to annul an arbitral award on competition law grounds unless the award itself would constitute a "flagrant, real and concrete violation of international public policy." This standard of review with respect to the compliance of international awards with international public policy has been followed by both the French Court of Appeal and the French Supreme Court since 1991.¹³
- The Brussels TPI has taken the opposite approach: in the SNF case it engaged in a detailed analysis of the Tribunal's reasoning in respect of Articles 81 and 82 (albeit without seeking to examine the evidence behind the award itself) in order to reach the conclusion that, although the Tribunal had applied Article 81 to annul the 1993 Contract, the Tribunal had nevertheless infringed Article 81 by failing to award

¹⁰ *Eco Swiss (op cit.)*, at ¶ 37.

¹¹ See *supra*, note 2.

¹² If the parties have waited to do so at the enforcement stage, the Paris Court of Appeal may direct them to submit the issue to the Arbitral Tribunal who has jurisdiction to address competition law issues (as in the Thalès case, see Judgment of the Paris Court of Appeal, 18 November 2004; for commentaries on the Thalès case, see *supra*, note 2.)

¹³ See French Supreme Court, decisions Nos. 1563, 1564 and 1565 of November 19, 1991, Applications Nos. 89-22.040, 41 and 42, Rev. Arb., 1992, p. 76, commentary by L. Idot. See also French Supreme Court, *Gallay vs. Fabricated Metals*, January 5, 1999 Rev. Arb., 2001, p. 807 and more recently, Paris Court of Appeal, March 4, 2004, Rev. Arb., 2005, p. 143.

sufficient damages to one of the parties. The review of the reasoning of awards by Belgian courts is not a new trend in Belgian case-law with respect to the interpretation of Article 1704(2)(a) of the Belgian Judicial Code, and therefore the TPI's approach only reflects a different approach in the degree of review of international awards.¹⁴

Apart from SNF's counsel (who included leading arbitration practitioners Emmanuel Gaillard and Bernard Hanotiau in the French and Belgian proceedings respectively), arbitration practitioners are likely to prefer the Paris Court of Appeal's approach to the Brussels TPI's. The latter effectively opens the way to appeals against any arbitral awards that may arguably raise competition law issues, which potentially includes a very large number of arbitral awards. Even when an arbitral tribunal has found that Article 81 or 82 has been infringed, an appeal can still be made with respect to the damages awarded. Assuming the TPI's decision is not reversed, any party that wishes to negotiate a discount on an arbitral award rendered in Brussels need only apply to the Belgian courts on the basis that there are difficult competition law issues that need to be examined (or re-examined). Parties choose arbitration precisely in order to avoid this type of risk.

In contrast, the French SNF case confirmed that it is the recognition and enforcement of the award, not the reasoning on the merits contained in the award itself, which must be reviewed to see whether it is contrary to public policy principles. This literal interpretation of Article V.2 (b) of the 1958 New York Convention is also in accordance with the more general principle that arbitral awards cannot and should not be reviewed on their merits, including for an alleged erroneous application of the law to the facts.

Furthermore, it is not at all clear that the Paris Court of Appeal's judgment is in fact less faithful to the ECJ's judgment in *Eco Swiss* than the Brussels TPI's judgment. ¶ 37 of the ECJ's judgment makes clear that EC law only requires the reviewing court to annul an arbitral award for breach of Article 81 where the court's "domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy." In other words, *Eco Swiss* does not require national courts to undertake a greater level of review in respect of EC competition law than they would where other public policy arguments are made.

¹⁴ Article 1704(2)(a) of the Belgian Judicial Code provides that "An arbitral award may be set aside if it is contrary to *ordre public*." It is worth noting that, as a matter of Belgian law, the reviewing court is entitled to carry out a detailed review where annulment is sought on grounds of national public policy, by way of exception to the general rule that the reviewing court should not review the merits of an award. See Keutgen and Dal, *L'Arbitrage en Droit Belge et International* (2nd ed., Brussels, 2006), at ¶ 566 (citing Civ. Liège, 6 March 1984, *Jur. Liège*, 1984, p. 197). For examples of Belgian decisions reviewing the reasoning of awards with respect to the compliance with *ordre public*, see B. Hanotiau and O. Caprasse, *L'annulation des sentences arbitrales*, J.T. 2004, p. 418, at §43, p.419.

In addition, it may be argued that the Paris Court of Appeal's approach is in fact consistent with the EC law principle that national procedural rules should in general be allowed to stand, as enunciated by the ECJ, for example, in answer to the fourth and fifth questions in *Eco Swiss*, in relation to the Dutch rules of *res judicata*. Indeed, in the *Eco Swiss* case itself, the Dutch courts ended up enforcing a final award that was contrary to Article 81 EC precisely because the Article 81 issue was considered unreviewable under the *res judicata* domestic rule of procedure. This issue had been raised by the Dutch courts, to which the ECJ responded that a final award contrary to Article 81 EC could be recognized if the Article 81 issue had been finally decided in a previous partial award and had become *res judicata* as a result. Not surprisingly, on March 28, 2000, the Dutch Supreme Court [Hoge Raad] held that the *res judicata* effect of the first *Eco Swiss* award prevented any challenge based on Article 81 EC:

“The answers of the ECJ put an end to this case, even if Mr. Groen [counsel for Benetton] boldly attempts to turn the tide. In essence, the situation is now such that Benetton has won the battle as far as [answer (1)] is concerned but has lost it with respect to [answer (2)]. The latter is determinative. Also taking into account the Supreme Court's finding in its interim decision [of 21 March 1997] ... this favourable [first] answer does not help Benetton. After all, the *res judicata* effect of the PFA, the partial final award holding that the parties are bound by their agreement, prevents a defense (i.e., regarding Art. 81 EC Treaty) in relation to the FAA, which decided on the quantum of Benetton's liability, aimed at attacking the decision that the parties are bound by their agreement.”¹⁵

In contrast, as a matter of Belgian law, the first award could not be considered as having *res judicata* authority in the face of international public policy.¹⁶ Yet it is not clear from the Brussels TPI's decision why it was necessary to annul the 2002 partial award, since there was no longer any contradiction between the two awards once the final award had been annulled.

The Brussels TPI decided to annul both the partial award of 2002 and the final award of 2004 because of the “entire reasoning being vitiated by a

¹⁵ See Hoge Raad [Supreme Court], 25 February 2000, *Eco Swiss China Time vs. Benetton International NV*, Yearbook Commercial Arbitration, A.J. van den Berg (ed.), Vol. XXV (2000), pp. 443 – 534.

¹⁶ Unlike the Dutch approach to the *res judicata* authority of arbitral awards, Article 1703 of the Belgian Judicial Code provides that “Unless the award is contrary to *ordre public* or the dispute was not capable of settlement by arbitration, an arbitral award has the authority of *res judicata* when it has been notified in accordance with paragraph 1 of Article 1702 and may no longer be contested before the arbitrators.” See also B. Hanotiau and O. Caprasse, L'annulation des sentences arbitrales, *id.* at §99, p.427.

contradiction, from the admission of a violation of article 81 EC Treaty [in the partial award] to the conclusions which were drawn [in the final award.]” While considering the actual outcome of the two awards, the Brussels TPI concluded that effectively “the solutions they bring to the dispute give effect to an anti-competitive contract.”

While the Brussels TPI judgment does appear to be more closely in line with the views of those practitioners who favour a more substantial review of international awards on antitrust issues, it goes beyond what most practitioners would expect: the Brussels TPI effectively reviewed the allocation of damages as a result of a contract held contrary to Article 81 EC.

In contrast, the Paris Court of Appeal refused to review the damages issue, holding “that the conclusions reached by the arbitral tribunal with regard to the evaluation of damages do not fall within the scope of review provided under Article 1502-5^o for the protection of fundamental principles.” The Paris Court of Appeal only verified that the Arbitral Tribunal had “addressed the issue of whether the 1993 contract complies with the provisions of Articles 81 and 82 of the EC Treaty, with respect to the facts and the legal arguments which were presented by the parties, as well as with respect to the case-law of the European Court of Justice.” This approach echoes the approach suggested by the U.S. Supreme Court in *Mitsubishi*: “While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.”¹⁷

Nevertheless, the Brussels TPI refused to review the underlying evidence. To the contrary, the Brussels TPI held that it was “not for this court to rehear the merits of the case which was submitted to arbitration but rather to verify, *by reading the award*, whether ... [t]he Tribunal has or has not breached Articles 81 and 82 of the EC Treaty, which are [rules of public policy].”

Here again, the Brussels TPI decision differs from the French SNF case: while the Paris Court of Appeal held that it would not hesitate to seek “all elements related to one of the grounds of challenge, *in fact and in law*, without any limitation, with respect to the violation of international public policy,” the Brussels TPI held that it would not re-hear evidence on the antitrust issues and limit its review to the *reasoning followed by the Arbitral Tribunal* while reading the award.

¹⁷ Mitsubishi Motors V. Soler Chrysler-Plymouth, 473 U.S. 614 (1985)

7. Conclusion

It is now clear that different courts in Europe may treat the same award in fundamentally different ways (unless either the French SNF case or the Belgian SNF case is reversed in subsequent appellate proceedings) when reviewing its compliance with international public policy principles, especially with respect to Article 81 EC.

Yet, the issue for the two courts reviewing the SNF award was not whether a contract was contrary to Article 81 or 82 EC: indeed, the arbitrators, the Paris Court of Appeal and the TPI all agreed that the 1993 Contract was contrary to Article 81 EC, that both parties should have been aware of such violation at the time of the conclusion of the contract and that there had been no breach of Article 82 EC. Instead, the Belgian and French courts were asked to review the Tribunal's award of damages resulting from that breach of Article 81 EC.

One can question whether the assessment of damages following a violation of Article 81 should be part of international public policy in Belgium or in other countries where the recognition of international arbitral awards is sought. Indeed, Article 81 prohibits concerted agreements which effectively restrict competition; unlike Article 82, Article 81 does not sanction the abuse of a dominant position. Because under Article 81, the contractual parties have acted in concert to restrict competition, Article 81 does not contemplate that the contracting party suddenly wishing to annul a contract under Article 81 (after having enjoyed its performance for years) be automatically rewarded if indeed a Tribunal finds that *both* parties concluded an agreement effectively restricting competition. More generally, if the assessment of damages following a violation of Article 81 becomes part of international public policy, parties may be encouraged to wait until the arbitrators award damages against them before raising Article 81 as a defence at the enforcement stage (as was also done by the respondents in both the *Eco Swiss* and *Thalès* cases), claiming that the remedy awarded eventually in the final award is not consistent with Article 81 EC. While it is legitimate to question the principle of an *absolute* arbitral finality of awards without *any* control, the finality of awards remains the central feature of international arbitration.

More generally, an overwhelming majority of arbitration practitioners (including in Belgium)¹⁸ agree that the review of arbitral awards by national courts should not become a broad and unlimited review on the merits of the case just because there is an allegation that international public policy has

¹⁸ See Keutgen and Dal, *L'arbitrage en droit belge et international*, Tome I, *Le Droit Belge*, 2nd edition, Bruylant 2006 at p. 466. See also B. Hanotiau, *Développements récents – législatifs et jurisprudentiels – en matière d'arbitrage commercial en Belgique*, *Cahiers de l'Arbitrage* 1997-2001, p. 165 at p. 169.

been violated. The limited approach adopted by the French courts to reviewing arbitral awards dealing with antitrust issues appears to be in line with the global trend. Indeed, other European countries seem to go towards a limited if not quasi-absent control of international awards with respect to their compliance with antitrust rules as a matter of international public policy.¹⁹

Furthermore, other fora may be used to address violations of international public policy rules to defend the public interest. The EC Commission, national courts (if the alleged violations of antitrust rules are of such importance that the parties may face criminal sanctions, any person aware of such violations is always free to complain to a public prosecutor) and administrative authorities also have jurisdiction to enjoin parties from behaving in violation of antitrust rules. They can issue fines and/or declare a contract void, regardless of the solution eventually adopted in parallel arbitral proceedings. This point was highlighted by the Paris Court of Appeal in SNF, and it was also raised recently by the U.S. Court of Appeal of the 7th Circuit in *Baxter International v Abbott Laboratories*.²⁰ It is striking that SNF decided to file a criminal complaint with a French court and to alert the European Commission of the alleged violation of Article 81 EC only after the final award granting damages to Cyttec was issued. Indeed, the Paris Court of Appeal noted this behaviour by SNF and the lack of any reaction on the part of the European Commission.

¹⁹ In 2005, the Dresden Court of Appeal enforced an award in which the arbitral tribunal found that the Claimant had validly terminated a cartel but nevertheless awarded damages to the Respondent. The Claimant then challenged the award based on a violation of public policy. The court held that substantive German public policy would only be violated if the decision reached in the award was in conflict with German antitrust law and found that, in this case, there was no such conflict. See Dresden Court of Appeal, April 20, 2005, published in SchiedsVZ 2005, 210, DIS-database.) Recently, the Swiss Supreme Court refused even to consider a challenge against an international ICC award rendered in Switzerland where the challenge was based on the alleged violation of EC competition rules. After noting that public policy comprises a body of essential and widely recognized values which can be divided between procedural and substantive rules, the Swiss Supreme Court considered that the values underlying competition law are not sufficiently important to meet this standard because of the divergences existing between systems of competition law around the world, including between Switzerland and the EU, and because of the absence of competition law in certain states. Swiss Supreme Court (“Federal Tribunal”), March 8, 2006, *X Sp.A v. Srl*, 24 ASA Bull. 3/2006, p. 550 (original in French available at p. 521), commented by Ph. Landolt.

²⁰ U.S. Court of Appeal, 7th Circuit, *Baxter International v Abbott Laboratories*, 315 F.3d 829 (2003): “Treating Baxter as bound (*vis-à-vis* Abbott) by the tribunal’s conclusion that the license (as construed to provide strong exclusivity) is lawful does not condemn the public to tolerate a monopoly. *If the three-corner arrangement among Baxter, Maruishi, and Abbott really does offend the Sherman Act, then the United States, the FTC, or any purchaser of sevoflurane is free to sue and obtain relief.* None of them would be bound by the award. As far as we can see, however, only Baxter is distressed by the award and Baxter, as a producer, is a poor champion of consumers.”

