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President's Message, Modern and Efficient Communication (or: “If you can’t beat ’em, join ’em”)

Articles

Georg VON SEGESSER, Katherine BELL, Arbitration of Trust Disputes

Thomas CLAY, La réforme des articles du Code civil sur l’arbitrage en France

Sandra DE VITO BIERI, Penelope NÜNLIST, The application of EU law by arbitral tribunals seated in Switzerland

Nadia SMAHI, The Arbitrator's Liability and Immunity Under Swiss Law – Part II

Innhwa KWON, Krzysztof NOWAK, Prescription Trap? Continuation of Freezing the Legal Prescription in International Arbitration – in Korean, Austrian, German and Swiss Context

LE Nguyen Gia Thien, Time limit to file petition for the recognition and enforcement of foreign arbitral awards: a comparative perspective

Swiss Federal Supreme Court

- 4A_102/2016 of 27. September 2016 (excerpts) [de novo review by appeal of arbitral tribunal]
- 4A_136/2016 du 3 November 2016 [Corruption allegation in a consultancy agreement – Proof of actual services not required]
- 4A_536/2016, 4A_540/2016 of 26 October 2016 [Punitives – Public policy]
- 4A_310/2016 of 6 October 2016 [Non-signatory – Extension of arbitration agreement denied]
- 4A_555/2016 of 10 October 2016 [Letter from arbitrator not found to be a challengeable award/Pre-arbitral mediation requirement]
- 4A_188/2016 of 11 January 2017 [Time limit for award]
- 4A_214/2016 of 4 May 2016 [Fax filing of annulment request not valid]
- 4A_322/2016 of 28 July 2016 [Arbitrator does not lack jurisdiction merely because he lacks technical expertise unless expertise is a contractual requirement/no right to untimely rebuttal opinion]
- 4A_342/2015 of 26 April 2016 (excerpts) [Refusal of a second exchange of briefs not found to be due process violation]
- 5A_672/2015 of 2 September 2016 [Enforcement of a decision rendered by the Court of First Instance of the Dubai International Financial Centre (DIFC) in Switzerland]
- 4A_542/2015 of 16 February 2016 [Award ordering a party to take action]

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Switzerland is generally regarded as one of the World’s leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world’s best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

The ASA Bulletin is the official quarterly journal of this prestigious association. Since its inception in 1983 the Bulletin has carved a unique niche with its focus on arbitration case law and practice worldwide as well as its judicious selection of scholarly and practical writing in the field. Its regular contents include:

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Aims & Scope
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The application of EU law by arbitral tribunals seated in Switzerland

SANDRA DE VITO BIERI, PENELope NÜNLIST

1. Introduction

An arbitral tribunal seated in Switzerland might be required to apply EU law, although its seat is in a non-EU member state. This article examines under which conditions such an obligation exists, if such an arbitral tribunal can at its own discretion apply EU law and the consequences of disregarding the requirement to apply EU law.

2. Application of EU law by an arbitral tribunal with seat in Switzerland

Art. 176 (1) PILA sets forth that the provisions of the 12th chapter of the PILA apply to all arbitrations, if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland. For arbitrations that fulfil those two prerequisites and for which the parties have not chosen to opt out of the 12th chapter of the PILA, art. 187 PILA governs the question of the law to be applied to the merits.

Art. 187 (1) PILA provides that the arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection. Hence, two distinct cases need to be examined: (i) does the arbitral tribunal need to apply EU law, if the parties have made a choice of law; and (ii) does the arbitral tribunal need to apply EU law, if the parties have forgone to choose the applicable rules of law.

1 This article bases on a speech delivered by Sandra De Vito Bieri on 30 September 2016 at the Dreiländer-Konferenz 2016 in Vaduz.
2 Sandra De Vito Bieri, Attorney at law, Partner and Co-Head of the Arbitration Practice Group, Penelope Nünlist, Attorney at law, Bratschi Wiederkehr & Buob Ltd., Zurich, Switzerland.
2.1 Choice of law by the parties

Once it has been established that the parties agreed validly to an applicable law on the merits, the question that needs to be answered is how wide the scope of the applicable law is. Generally, the choice of law encompasses the entirety of the law: it includes statutes, decrees, regulations and other legal instruments of the chosen law as well as international treaties that are in force in the state to which the choice of law refers. Consequently, the law must be applied in its entirety to the legal questions of the arbitration, regardless of whether provisions of private or public law of the _lex causae_ are concerned. The choice of law also includes public policy of the chosen law.

2.1.1 Choice of substantive law of an EU member state

As EU law is either part of an international (self-executing) treaty in force in the EU member state or has become part of the national laws of an EU member state, EU law needs to be applied by an arbitral tribunal, if the parties chose to apply the substantive laws of an EU member state to a dispute.

In case the parties chose the substantive laws of an EU member state as _lex causae_, the arbitral tribunal has the obligation to apply EU law _ex officio_, if the parties have forgone to invoke EU law following the principle of _iura novit arbiter_.

2.1.2 Choice of substantive law of a non-EU member state

Does the arbitral tribunal also need to consider EU law, if the substantive law of a non-EU member state was chosen by the parties? According to the Swiss Federal Supreme Court the arbitral tribunal needs to

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6 BERGER/KELLERHALS, no 1424; KARRER, BSK, Art. 187 PILA no 112.
consider EU law, if a party invokes certain provisions or rules of EU law, which according to EU law are applicable in the specific case.\(^\text{10}\) The more difficult question is, whether the arbitral tribunal also needs to apply EU law \textit{ex officio}, if none of the parties plead its application. This question refers to the issue of mandatory foreign law. Art. 19 PILA sets out rules on when a Swiss state court needs to apply mandatory foreign law. The Swiss Federal Supreme Court, however, has held that art. 19 PILA is not directly applicable to arbitration.\(^\text{11}\) Further, the Swiss Federal Supreme Court has ruled that the arbitral tribunal is under no obligation to apply foreign law, which would normally be applicable, if none of the parties have relied on that foreign law.\(^\text{12}\) Hence, the arbitral tribunal is not required to apply EU law \textit{ex officio}, if the law of a non-EU member state is the \textit{lex causae} and none of the parties invoke specific EU law provisions.\(^\text{13}\)

This being said, the arbitral tribunal may at its own discretion choose to apply mandatory EU law provisions, even though not invoked by the parties.\(^\text{14}\) Recent legal doctrine is of the view that the arbitral tribunal shall by analogy apply art. 19 PILA\(^\text{15}\) and shall consider foreign mandatory rules under the following conditions\(^\text{16}\):

- the state enacting the specific rule wanted it to be applied in international situations such as the one before the arbitral tribunal; and
- a close connection between the rule and the situation exists from the arbitral tribunal’s objective perspective; and
- the result of the application of the rule must be in accordance with transnational standards generally accepted in a majority of states.\(^\text{17}\)

\(^\text{10}\) SCD 132 III 389, para. 3.3; Supreme Court Decision 4P.119/1998 of 13 November 1998, para. 1a; HAAS, p. 71.
\(^\text{11}\) Supreme Court Decision 4P.115/1994 of 30 December 1994, para. 2c.
\(^\text{13}\) See HAAS, p. 73; KORMAZCAN ISIK, The Monitoring and Enforcement of Commitments by way of Arbitration in EU Competition Law, Zürich 2015, no 74.
\(^\text{14}\) Supreme Court Decision 4P.119/1998 of 13 November 1998, para. 1.a; for an overview of legal doctrine on the question of application of foreign mandatory law by an arbitral tribunal see BERGER/KELLERHALS, no 1452 et seq. and KAUFMANN-KOHLER/RIGOZZI, no 7.96 et seq.
\(^\text{15}\) BERGER/KELLERHALS, no 1428: HAAS, p. 75; KAUFMANN-KOHLER/RIGOZZI, no 7.96; an overview of opinions on this question provides KARRER, BSK, Art. 187 PILA N 263.
\(^\text{16}\) There are many different opinions under which conditions exactly mandatory foreign rules shall be considered by the arbitral tribunal, for an overview see KARRER, BSK, Art. 187 PILA N 264 et seq.
\(^\text{17}\) HAAS, p. 75; KAUFMANN-KOHLER/RIGOZZI, no 7.98.
Summarizing the above, an arbitral tribunal with seat in Switzerland may apply mandatory foreign law ex officio, but is under no obligation to do so and, thus, has wide discretion in deciding when mandatory EU law shall be applied to a specific case, for which the lex causae of a non-EU member state was chosen by the parties. However, if doing so, the arbitral tribunal must make sure that the parties’ right to be heard is duly granted by allowing the parties to give their view on the application of the mandatory EU law rule, if they could not expect the arbitral tribunal to rely on that specific rule of law.

2.2 Exclusion of EU law by the parties

Under Swiss lex arbitri, the parties can choose to not apply a particular substantive law – so called negative choice of law – or to only apply a certain part of a particular law. If the parties were to include such a choice of law in their agreement with regard to EU law, would the arbitral tribunal be bound by the choice of the parties or do circumstances exist under which an arbitral tribunal would have to apply EU law regardless of the parties’ choice?

2.2.1 Negative choice of law

In case of a negative choice of law, the parties agree to exclude the application of a certain substantive law. As a result, the arbitral tribunal is required to determine the applicable rules of law based on the closest connection test without taking into consideration the excluded substantive law. Thus, if the parties would agree on a negative choice of law excluding the application of the substantive laws of each EU member state, the arbitral tribunal would need to disregard EU law and determine the applicable law through the closest connection test. However, if the parties only agreed to exclude the substantive laws of one or a few EU member states, EU law would need to be applied by the arbitral tribunal, if the closest connection test would result in the application of the substantive laws of an EU member state not mentioned in the negative choice of law provision.

The parties could exclude by negative choice of law the substantive laws of each EU member state. It needs, therefore, to be examined if in such

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18 Berger/Kellerhals, no 1429; Haas, p. 74.
19 SCID 130 III 35, para. 5; Berger/Kellerhals, no 1435; Kormazcan Isik, no 74.
20 Berger/Kellerhals, no 1394; Kaufmann-Kohler/Rigozzi, no 7.21.
21 Berger/Kellerhals, no 1397; Kaufmann-Kohler/Rigozzi, no 7.18.
22 Berger/Kellerhals, no 1394.
23 Berger/Kellerhals, no 1394; Kaufmann-Kohler/Rigozzi, no 7.21.
a case the arbitral tribunal could disregard the negative choice to some extent and apply mandatory EU law *ex officio*. As discussed above, it is broadly accepted that the arbitral tribunal has large discretion on deciding when to apply a mandatory foreign law rule. It seems questionable whether the arbitral tribunal shall have the same discretion and may apply mandatory EU law provisions, if the parties agreed to exclude the application of the substantive laws of each EU member state. In contrast to a “normal” choice of law, where the parties generally do not explicitly exclude the application of other laws, the parties through a negative choice of law explicitly provide that they do not wish to have such law applied to their dispute. The dilemma the arbitral tribunal faces is that it risks its award being overturned for exceeding its competence or applying the wrong law, if it applies EU law although the parties have explicitly directed it not to.24 Certainly, the arbitral tribunal would be free to consider EU law *ex officio*, if the sole reason for the parties’ negative choice of law was the abusive circumvention of certain mandatory rules of EU law.25 The authors are moreover of the view that even if the exclusion of EU law was not made to circumvent mandatory rules of EU law abusively, the *ex officio* application of mandatory rules of EU law shall lie within the discretion of the arbitral tribunal.26

### 2.2.2 Choice of the substantive laws of an EU member state excluding EU law

A different approach for the exclusion of EU law is agreeing on the substantive laws of an EU member state, but excluding EU law. As parties are free to agree only to apply certain provisions of a certain law,27 such an exclusion of EU law through a choice of law should principally be possible. However, certain limits to such a choice of law exist: the choice of law may not harm the integrity of the contract, nor the authority of the law.28

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24 KORMAZCAN ISIK, no 76, see below section 3 on the issue of challenging the award.
26 COURVOISIER, p. 383 et seq.; probably contra KARRER, BSK, Art. 187 PILA no 251.
28 KAUFMANN-KOHLER/RIGOZZI, no 7.18; SCHNYDER, p. 684.
In such a situation it seems possible that – once the arbitral tribunal has distinguished the provisions of the applicable law that are considered EU law provisions from those that are considered “national” (and thus non-EU) law provisions – the arbitral tribunal could face the problem that the excluded EU law provisions govern a particular issue of the case for which the applicable national (non-EU) law of an EU member state does not contain any rules. In this case, the arbitral tribunal would need to apply the closest connection test to find out, which law should govern the specific question for which the national (non-EU) law of the EU member state does not provide any rules, without considering the EU law that was excluded by the parties. 29 Only if the exclusion of EU law would lead to a situation where despite applying the closest connection test the arbitral tribunal could not identify the rules of law that should govern the issue, the arbitral tribunal should – after having unsuccessfully consulted the parties on the question of the applicable law – ignore the exclusion of EU law to the extent necessary for finding a satisfactory ruling. 30 Further, the arbitral tribunal should consider EU law, if the exclusion of EU law was solely made to abusively circumvent the application of mandatory EU law provisions and may consider mandatory EU law provisions, even if the exclusion was not made abusively.

2.3 No choice of law by the parties

If the parties have not made a valid choice of law, the arbitral tribunal shall decide the dispute according to the rules of law with which the case has the closest connection (art. 187 (1) PILA). The general conflict of law rules of the PILA do not apply to arbitration.31 The arbitral tribunal has a large decree of discretion when deciding on the closest connection of a law to the dispute.32 Legal doctrine has developed many different ways as to how an arbitral tribunal can reach its decision on the closest connection. For the purpose of this paper it can be said that should the arbitral tribunal come to the conclusion that the substantive laws of an EU member state have the closest connection to the dispute, it needs to consider the applicable EU law.33

If, however, the arbitral tribunal establishes that the dispute has a closer connection with the law of a non-EU member state, it might still apply

29 COURVOISIER, p. 402 & 461.
30 COURVOISIER, p. 462; similar SCHNYDER, p. 685.
31 KAUFMANN-KOHLER/RIGOZZI, no 7.39.
32 BERGER/KELLERHALS, no 1413.
33 For an overview see BERGER/KELLERHALS, no 1410 et seq.; KARRER, BSK, Art. 187 PILA no 135 et seq.; KAUFMANN-KOHLER/RIGOZZI, no 7.38 et seq.
EU law to certain questions. This would especially be the case if the arbitral tribunal were to come to the conclusion that a specific legal question has a closer connection to the substantive laws of an EU member state than to the generally applicable third-country law. Moreover, the arbitral tribunal might decide that a mandatory EU law rule shall be applied to the dispute regardless of the closest connection test’s general result. In such a case, it must be argued that the arbitral tribunal made a discretionary decision to apply the mandatory EU law as it came to the conclusion that that mandatory rule of law has the closest connection, meaning that the arbitral tribunal does not need to rely on the application of art. 19 PILA by analogy.

3. Appeal against arbitral awards based on the refusal or wrong application of EU law

As shown above, an arbitral tribunal is in general terms required to apply EU law, if (i) the parties have chosen the law of an EU member state as lex causae or (ii) have chosen a different law but the parties invoke applicable EU law and (iii) may even apply EU law ex officio, if the parties forgo to invoke EU law. Further, in the absence of a choice of law, EU law needs to be applied if the closest connection test results in the application of the law of an EU member state for the entire dispute or certain aspects of the dispute. While the arbitral tribunal might be under the obligation to apply EU law to the dispute, the failure to take into account EU law does not necessarily result in the annulment of the award by the Swiss Federal Supreme Court. The possibility of challenging the arbitral award in a post-arbitral stage is a very distinct issue from the question on when the arbitral tribunal rightfully should apply EU law.

The grounds for setting aside the arbitral award are solely governed by art. 190 PILA. Only two of the listed grounds seem relevant if the arbitral tribunal fails to apply EU law: (i) the arbitral tribunal has wrongly accepted or denied jurisdiction on an EU law issue (art. 190 (2) b PILA) or (ii) the award is incompatible with public policy (art. 190 (2) e PILA).

34 KARRER, BSK, Art. 187 PILA no 155; KAUFMANN-KOHLER/RIGOZZI, no 7.49.
35 KARRER, BSK, Art. 187 PILA no 285
36 Art. 191 PILA; if the parties have not excluded the possibility to set aside the arbitral tribunal’s decision according to art. 192 PILA.
37 BERGER/KELLERHALS, no 1702.
3.1 Appeal based on art. 190 (2) b PILA

According to art. 190 (2) b PILA, the Swiss Federal Supreme Court may annul the arbitral award, if the arbitral tribunal has wrongly accepted or denied jurisdiction. The Swiss Federal Supreme Court has held that an arbitral award may be set aside, if the arbitral tribunal has denied the application of foreign mandatory law arguing that it lacks jurisdiction for the application of the law although one of the parties invoked the specific rule of law.\(^{38}\) In this specific case, the parties had chosen Swiss law as the *lex causae*, but one party had explicitly invoked art. 85 EEC treaty and based its argument of nullity of the parties’ agreement thereon. The arbitral tribunal had argued that it had no jurisdiction on deciding whether the agreement was null and void based on art. 85 EEC treaty and had rendered its award without applying art. 85 EEC treaty.\(^{39}\) The Swiss Federal Supreme Court, however, held that the arbitral tribunal had jurisdiction to decide on the nullity of the agreement based on art. 85 EEC treaty, as neither the EEC treaty nor its implementation regulations forbade the arbitral tribunal to decide on the matter.\(^{40}\) It further held that the arbitrability of a dispute was solely governed by the *lex arbitri*, in *casu* art. 177 PILA and that the application of art. 85 EEC treaty was indeed a matter covered by art. 177 PILA.\(^{41}\)

Hence, an arbitral award declaring the arbitral tribunal incompetent to rule on an EU law issue although the law would be applicable to the case and a party invokes the specific rule, will be set aside by the Swiss Federal Supreme Court. This specific case needs to be distinguished from a case where the arbitral tribunal does not deny its jurisdiction but merely refrains to apply EU law.\(^{42}\) In a case where none of the parties have invoked the specific EU law provision, the arbitral award could not be overturned based on art. 190 (2) b PILA, as the arbitral tribunal has no duty to apply EU law *ex officio*.

As briefly touched upon above, in case the parties explicitly excluded the application of EU law, but the arbitral tribunal decides to apply EU law regardless, the arbitral tribunal may exceed its competence. The arbitral tribunal would in such a case decide the dispute against the parties’ choice of law. However, the failure to apply the correct law to a dispute is not a question of the arbitral tribunal’s jurisdiction, but merely a question of which

\(^{38}\) SCT 118 II 193; SCT 132 III 389, para. 3.3; BERGER/KELLERHALS, no 1717; PFISTERER, BSK, Art. 190 PILA no.45.

\(^{39}\) SCT 118 II 193.

\(^{40}\) SCT 118 II 193, para. 5c.

\(^{41}\) SCT 118 II 193, para. 5c; SCHWANDER, Überprüfung von Vereinbarungen auf ihre Vereinbarkeit mit Art. 85 EWG-Vertrag durch Schiedsgerichte, AJP 1993, S. 89ff. 91.

\(^{42}\) HAAS, p. 76; PFISTERER, BSK, Art. 190 PILA no.45.
legal provisions should rightfully be applied to the dispute and therefore is not subject to an annulment based on art. 190 (2) b PILA.\(^\text{43}\)

### 3.2 Appeal based on art. 190 (2) e PILA

According to art. 190 (2) e PILA, the Swiss Federal Supreme Court may annul the arbitral award, if the award is incompatible with public policy. This ground for annulment encompasses the procedural and substantive public policy.\(^\text{44}\) For the purpose of this paper, only the substantive public policy needs to be examined. Substantive public policy is only violated, if the result of the challenged decision “violates fundamental principles of law and is therefore plainly incompatible with the legal system and the system of values”.\(^\text{45}\) The award may not be set aside, if only the reasoning appears to violate public policy; the violation of public policy must manifest itself in the dispositive part of the arbitral award.\(^\text{46}\)

#### 3.2.1 Definition of public policy

To assess whether the refusal to apply or wrong application of EU law has violated public policy, it needs to be determined, which or which notion of public policy is decisive for the Swiss Federal Supreme Court. In the Tensacciai decision, the Swiss Federal Supreme Court held that it “[…] has strived to free the notion of public policy under art. 190 (2) e PILA from any connection with national legal systems, whether the lex fori, the lex causae, or the law of a third country. This is because the ground for annulment set forth in that provision does not aim at protecting the Swiss legal order […] or the improper application of the foreign law governing the merits of the dispute, even if the latter is mandatory, or a failure to take into account a mandatory provision of the laws of a third state.”\(^\text{47}\) It concluded with a definition of public policy saying that “an award violates public policy if it disregards essential and widely recognized values that should, according to the concepts prevailing in Switzerland, form the bases of every legal system”.\(^\text{48}\) It is safe to say that the Swiss Federal Supreme Court does not apply a solely Swiss public policy notion. Neither is the definition of EU public policy decisive, even if the

\(^{43}\) BERGER/KELLERHALS, no 1719.

\(^{44}\) KAUFMANN-KOHLER/RIGOZZI, no 8.188.

\(^{45}\) SCD 116 II 634, para. 4; BERGER/KELLERHALS, no 1765.

\(^{46}\) BERGER/KELLERHALS, no 1765.

\(^{47}\) SCD 132 III 389, para. 2.2.2.

\(^{48}\) SCD 132 III 389, para. 2.2.3.
The substantive law of an EU member state is the *lex causae* or mandatory rules of EU law should have been applied by the arbitral tribunal. The Swiss Federal Supreme Court strives to apply a universal public policy, which, however, cannot be entirely detached from the Swiss values and legal system as, in the end, Swiss judges apply art. 190 (2) e PILA.49

### 3.2.2 Content of public policy

The content of public policy according to art. 190 (2) e PILA is difficult to grasp and the abstract definition by the Swiss Federal Supreme Court makes this task even more difficult. The Swiss Federal Supreme Court defines it by using examples, including the following principles50: *pacta sunt servanda*, the prohibition of abuse of rights, the principle of good faith, the prohibition of discrimination, no expropriation without compensation, and the protection of individuals lacking legal capacity.51 This list already shows that a wrong application of the *lex causae*, even if apparent and thus arbitrary, does not fall within the scope of art. 190 (2) e PILA.52 The same applies for the application of a wrong *lex causae*53 as well as the omission to apply mandatory foreign law, even if such rules are *lois de police*.54 However, should in fact the foreign mandatory law itself be part of public policy according to art. 190 (2) e PILA, an arbitral award could successfully be challenged on this ground. It has been debated, whether EU competition law is such a foreign mandatory rule of law that is part of public policy according to art. 190 (2) e PILA, thus allowing an arbitral award to be challenged, if the arbitral tribunal had failed to apply EU competition law.

### 3.2.3 Is competition law part of public policy?

The Swiss Federal Supreme Court has had the opportunity to rule on a case, where a party had challenged the award based on art. 190 (2) e PILA because the arbitral tribunal had not applied EU competition law although that party had invoked such law during the arbitral proceedings. The party

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50 KAUFMANN-KOHLER/RIGOZZI, no 8.197.
51 With references BERGER/KELLERHALS, no 1766; KAUFMANN-KOHLER/RIGOZZI, no 8.198.
52 SCD 116 II 634, para. 4.
53 SCD 138 III 270, para. 3.2.2; BERGER/KELLERHALS, no 1420 & 1769.
54 BERGER/KELLERHALS, no 1773 et seq.
had argued that based on EU competition law the agreement between the parties was void.\textsuperscript{55} Before the Swiss Federal Supreme Court decided the matter of whether competition law is part of public policy or not, the ECJ (although in a different case) had already ruled on this question: EU competition law is from an EU perspective considered as public policy. The ECJ expressly held that public policy included European competition law, in particular art. 101 et seq. TFEU / art. 81 EC Treaty.\textsuperscript{56} The Swiss Federal Supreme Court, thus, had the chance to clarify, whether competition law is also part of public policy according to art. 190 (2) e PILA. It rejected the notion based on the following grounds:

Firstly, it laid out that Switzerland as well as the main industrialized states and even some developing countries had adopted laws preventing restrictions on competition and that the fight against cartels was one of the main priorities of the EU. It continued that it would be presumptuous to take the view that such principles should be imposed on all states, as such concepts were inevitably linked to the different economic systems. It further stated that the differences in the various competition laws were marked, which would make it very difficult to find a common essence, from which a principle linkable to public policy could be derived and would most certainly not result or be modelled according to art. 81 EC Treaty. It summarized that it would, therefore, not be able to find a transnational rule or a rule pertaining to public policy for competition law.\textsuperscript{57}

Secondly, the Swiss Federal Supreme Court noted that the ECJ had held art. 81 EC Treaty to be part of public policy, but swiftly concluded that this ruling was based on the necessity to protect the European Community’s public interest. According to the Swiss Federal Supreme Court, such a reasoning provides for a limited territorial scope and an internal procedural rule, which made sure art. 81 EC Treaty was respected. Therefore the reasoning of the ECJ could not be applied to art. 190 (2) e PILA.\textsuperscript{58}

The Swiss Federal Supreme Court concluded that “[…] there is no room for doubt: the provisions of competition laws, whatever they may be, do not belong to the essential and widely recognized values that should, according to the concepts prevailing in Switzerland, form the basis of every

\textsuperscript{55} SCD 132 III 390.
\textsuperscript{56} ECJ (1.6.1999) C-126/97, Eco Swiss China Time Ltd. v. Benetton International NV, no 36; HAAS, p. 58 f.; KORMAZCAN ISIK, n 84, arguing that only a serious breach violates EU public policy (no 88).
\textsuperscript{57} SCD 132 III 389, para. 3.1.
\textsuperscript{58} SCD 132 III 389, para. 3.1.
Hence, the failure of an arbitral tribunal seated in Switzerland to apply EU competition law does not violate public policy according to art. 190 (2) e PILA and a party challenging such an award based solely on this omission, would not be successful.

Sandra DE VITO BIERI, Penelope NÜNLIST, *The application of EU law by arbitral tribunals seated in Switzerland*

**Summary**

Arbitral tribunals with seat in Switzerland are required to apply EU law under various conditions: It seems fairly clear that the arbitral tribunal needs to apply EU law, if the parties have chosen the law of an EU member state as lex causae, as EU law forms in this case part of the chosen law. The same applies when the parties have forgone to make a choice of law and the closest connection test results in the application of the law of an EU member state. In case the parties have chosen a third state’s law as lex causae, the arbitral tribunal needs to consider EU law, if a party invokes its application. Last, the arbitral tribunal may in some instances apply EU law ex officio, even if none of the parties have invoked the application of EU law.

Although the arbitral tribunal may be required to apply EU law, the failure to apply or the wrong application of EU law does not necessarily result in setting aside of the award by the Swiss Federal Supreme Court. The failure to apply or the wrong application of EU law does not violate public policy. Hence, a challenge of the arbitral award based on art. 190 (2) e PILA will be unsuccessful. This holds also true if the arbitral tribunal decides not to apply EU competition law, as the Swiss Federal Supreme Court does not consider EU competition law part of public policy. The failure to apply EU law by the arbitral tribunal will only then result in a successful challenge of the arbitral award based on art. 190 (2) b PILA, if the arbitral tribunal found that EU law would be applicable to the dispute but denies its jurisdiction to decide the EU law issue.

59 SCD 132 III 389, para. 3.2.
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Manuscripts and related correspondence should be sent to the Editor. At the time the manuscript is submitted, written assurance must be given that the article has not been published, submitted, or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within eight to twelve weeks. Manuscripts may be drafted in German, French, Italian or English. They should be submitted by e-mail to the Editor (mscherer@lalive.ch) and may range from 3,000 to 8,000 words, together with a summary of the contents in English language (max. 1/2 page). The author should submit biographical data, including his or her current affiliation.

Aims & Scope
Switzerland is generally regarded as one of the World’s leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world’s best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

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