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# CPI ANTITRUST CHRONICLE

## JULY 2019

### **EU Competition Arbitration: A Reliable Forum for Private Enforcement**

*By Dr. Gordon Blanke*



### **Does Arbitration Offer an Effective Forum When Fighting for Competition Damages?**

*By William Towell*



### **Arbitration Clauses and Antitrust Damages in the EU: Where are We Now?**

*By Yves Botteman & Camille Keres*



### **Barriers to Entry: On Evidence in Competition Law Arbitration**

*By Alexandra K. Theobald*



### **International Arbitration and Domestic Antitrust: Natural Progression or Random Alliance?**

*By Vera Korzun*



### **The Private Enforcement Directive's Toolkit in Arbitration**

*By Emilio Paolo Villano*



### **Arbitration and Competition – A Swiss Perspective**

*By Dr. Hubert Orso Gilliéron & Jean Marguerat*



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## I. INTRODUCTION

After decades of development, a large number of countries and jurisdictions have integrated competition rules into their legal system. In Europe, competition law has been part of the legal landscape for years, playing an important role in the creation of a single market and, as a consequence, of the European Union. Switzerland followed the European path, despite its tradition of collective decision-making and the wide-spread presence of “official” cartels in the country.

Awareness about competition law has increased significantly among lawyers. The number of fines imposed by national authorities and by the European Commission certainly contributed to such awareness. The possibility to claim damages following decisions by enforcement agencies also played a role. However, daily routine is largely made of commercial disputes, where competition rules may be used as a legal argument to defend a position in court or as a means to facilitate the settlement of a dispute.

While international commercial disputes are increasingly handled by arbitral tribunals instead of state courts, arbitration may also be a valid option to resolve disputes involving arguments based on competition law. This is particularly true in Switzerland, where laws are deliberately designed to promote arbitration as an efficient dispute resolution mechanism. While not exclusively limited to Switzerland, this contribution will focus on the specificities of arbitration in that country and the possibility to arbitrate disputes involving competition law arguments. As we will show, Switzerland’s favorable legislation for arbitration, coupled with the liberal approach of Swiss state courts towards arbitration and Switzerland’s neutrality, non-membership of the European Union, and long tradition in international arbitration, make Switzerland a very attractive place for arbitrating disputes involving competition law arguments.

## II. COMPETITION LAW DISPUTES

### *A. Competition Law as an Argument in a Commercial Dispute*

It is not our intention to present competition regulations to competition lawyers. A short reminder of some basic situations where competition law arguments may be of relevance in the daily routine of a commercial lawyer seems, however, opportune. Indeed, the bulk of effective or potential competition law disputes pertain to ordinary business relationships and usual business matters.

All competition rules may be envisaged as powerful arguments in the context of a commercial dispute, notably:

- Arguments based on alleged abuse of a dominant position may be used to obtain better commercial terms (unfair or excessive commercial conditions), to force a dominant player to

contract (or not to terminate a business relationship) (refusal to deal), to avoid buying a product or a service which is not necessary or desired (tying), etc.

- Rules prohibiting restrictive agreements may be used to defend a party's commercial freedom, notably in terms of the geographical scope of activity, pricing, output, sourcing, customers, etc.

Competition law arguments should not be underestimated. Firms and their advisors nowadays know how long, costly, and disruptive an investigation can be. If the argument is valid, amicably settling a dispute may well be a valid option for both parties.

It may however be that the parties do not appreciate the situation in the same manner, or that the argument is only raised as a defense or at a later stage in the proceedings.

In such case, one must determine if and to what extent competition claims can be resolved through arbitration, either in the application of an existing arbitration clause in a contract ("*clause compromissoire*") or by way of a submission agreement ("*compromis*") concluded by the parties once the dispute has arisen.

## ***B. Arbitrability of Competition Law Disputes and Public Policy***

### 1. In General

For a long time, the arbitrability of competition law disputes was in doubt because of its public policy nature and the fundamental importance of the legislations governing this field: be it for their impact on the market or their policy dimension, the limitation imposed on economic freedom, both in the United States and in the European Union.

Nonetheless, arbitrability has gradually been accepted as a result of increased awareness of the fundamental distinction between the subject matter of the dispute and the nature of the rules in question.<sup>2</sup> In Switzerland, a second instance court, the *Tribunal cantonal vaudois* had already perfectly understood this distinction in 1975: the court observed that it was necessary to distinguish "between the subject matter of the arbitration, which is a dispute concerning a right of which the parties may freely dispose [such as dispute pertaining to the validity of a contract], and the legal rules which are applicable to the solution of the dispute."<sup>3</sup> The Swiss Supreme Court has confirmed this solution more recently under the Private International Law Act ("PILA"), where Chapter 12 contains Switzerland's International Arbitration Law or *lex arbitri*.<sup>4</sup>

Ten years after the *Tribunal cantonal vaudois*, the U.S. Supreme Court also recognized the arbitrability of disputes which might involve the application of U.S. antitrust legislation in its famous *Mitsubishi v. Soler Chrysler-Plymouth* case.<sup>5</sup> Also, in most European countries, the arbitrability of disputes raising questions of European competition law has been progressively recognized by the courts and legal commentators.<sup>6</sup>

Nowadays, not only can disputes involving competition law arguments be arbitrated, arbitral tribunals simply cannot ignore competition law rules pertaining to public policy, and must address them in their award, failing which the validity of its enforcement could be compromised.

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<sup>2</sup> J.-F. Poudret & S. Besson, *Comparative Law of International Arbitration*, 2<sup>nd</sup> ed., 2007, London, Sweet&Maxwell, p. 296 N. 347.

<sup>3</sup> JdT 1981 III 71.

<sup>4</sup> ATF 118 II 193.

<sup>5</sup> 473 U.S. 614 (1985). In this case, where the parties had agreed to submit their disputes to Swiss law and to arbitration in Japan under the rules of the "Japan Commercial Arbitration Association" the U.S. Supreme Court underlined the specific character of international disputes and recognised the validity of the parties' arbitration agreement as follows: "We conclude that concerns of International Comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the International commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context." (473 U.S. 629).

<sup>6</sup> A. Rigozzi, *Arbitrage, ordre public et droit communautaire de la concurrence*, ASA Bul. 1999, pp. 455-487. For more details see Poudret & Besson, *op. cit.*, p. 297 N. 349.

This restriction to the powers of an arbitral tribunal was set out by the U.S. Supreme Court in “footnote 19” of its *Mitsubishi* judgement.<sup>7</sup> In the same line, the ECJ’s *Eco Swiss v. Benetton* decision also reserved the control of the courts over the application of competition law by an arbitral tribunal in the European Economic Community.<sup>8</sup>

This conception of the respective powers of the arbitral tribunal and the court has been called the “second look doctrine.” It allows the court to review the contents of the arbitral award from the point of view of public policy so as to ensure respect for those rules of competition law which are characterized as forming part of public policy. This is not a limit to the arbitrability of disputes involving competition law, but a control over the content of the arbitral award.<sup>9</sup> While this approach prevails in the United States and in the European Union, this is not necessarily the case elsewhere, such as in Switzerland.

## 2. In Switzerland

Competition claims that are raised defensively (“competition claims as a shield”), e.g. by a respondent seeking to invalidate contractual provisions, are fully arbitrable under Swiss law.<sup>10</sup> Affirmative competition claims (“competition claims as a sword”), e.g. claims seeking relief for alleged violations of competition law, are “arbitrable provided that they entail a financial interest,” which is the criterion for arbitrability according to the PILA, the Swiss *lex arbitri*.<sup>11</sup>

The Swiss Supreme Court has held that arbitrability may only be denied in the case of a dispute whose judicial handling is exclusively entrusted to state court judges pursuant to provisions that are mandatory in light of public policy,<sup>12</sup> such questions being solely assessed in light of the public policy to be respected by the arbitral tribunal, pursuant to Art. 190 para. 2 let. e PILA, and not to any foreign concept of public policy.<sup>13</sup>

The Swiss Supreme Court favors a pragmatic approach to this notion on a case-by-case basis, considering that the rather vague term of “public policy” may not be defined to suit an unlimited number of circumstances.<sup>14</sup> However, the Swiss Supreme Court usually defines the term by giving a general definition and by listing non-exhaustive examples.<sup>15</sup> Regarding competition law, the Swiss Supreme Court held in a decision of 2006 that there was “no longer room for doubt,” and that the provisions of competition law are not part of public policy as they “do not pertain to the essential and broadly recognized values which, according to the prevailing opinion in Switzerland, should be the basis for any legal system.”<sup>16</sup>

The approach followed by the Swiss Supreme Court therefore diverges from the position adopted by the European Court of Justice, according to which EU competition law must be regarded as a matter of public policy within the meaning of the New York Convention.<sup>17</sup>

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7 Having found that the parties’ agreement contained a choice of Swiss law which gave rise to the fear that U.S. antitrust law might not be applied in a way it requires, the court stated at footnote 19 of its judgement: “We therefore have no occasion to speculate on this matter at this stage in the proceedings, when Mitsubishi seeks to enforce the agreement to arbitrate, not to enforce an award. Nor need we consider now the effect of an arbitral tribunal’s failure to take cognizance of the statutory cause of action on the claimant’s capacity to reinstate suit in federal court. We merely note that in that in the event of the choice of forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.”

8 *Eco Swiss China Ltd. v. Benetton International NV* (1991) ECR I-3055 Case C 126/97 p. 3055.

9 Poudret & Besson, *op. cit.*, pp. 300-301 N. 352.

10 ATF 118 II 193; ATF 132 III 389.

11 Article 177 para. 1 of the Swiss Private International Law Act (PILA).

12 ATF 118 II 353 at 3.

13 D. Girsberger, A. Heini, M. Keller, J. Kren Kostkiewicz, Kurt Siehr, F. Vischer & P. Volken in: *Zürcher Kommentar zum IPRG, ZK – Zürcher Kommentar*, 2<sup>nd</sup> ed., Zurich, 2004, ad Art. 177 N 25.

14 ATF 120 II 155 at 6a.

15 Swiss Supreme Court Decision 4A\_116/2016 of December 13, 2016 at 4.1: “An award is incompatible with public policy if it disregards some essential values which, according to the prevailing views in Switzerland, should represent the grounds of a legal order (ATF 132 III 389 at 2.2.3). Procedural public policy is distinguished from substantive public policy. An award is inconsistent with substantive public policy when it violates some fundamental principles of law to such a degree that it is no longer consistent with the governing legal order and system of values; among such principles are, in particular, the principle of contractual fidelity, compliance with the rules of good faith, the prohibition of the abuse of rights, the prohibition on discriminatory or confiscatory measures, and the protection of legally incapable persons.”

16 ATF 132 III 389 = ASA Bull. 2006, p. 231.

17 See e.g. *Eco Swiss China Ltd v. Benetton International NV* (1991) ECR I-3055 Case C 126/97.

The question of arbitrability must be distinguished from the question of the law applicable to the merits of a dispute. If such law contains any mandatory provisions with respect to the dispute's merits, the arbitral tribunal must naturally apply these provisions in its reasoning.<sup>18</sup>

### **C. Agreement to Arbitrate (Pre-Dispute)**

In order for a dispute pertaining to a competition law issue to be resolved by arbitration, an agreement to arbitrate must exist.

In most instances, the agreement to arbitrate is included in the form of an arbitration clause contained in the commercial agreement to which the dispute relates ("*clause compromissoire*").

The parties may, however, elect to arbitrate their dispute after it has arisen, by way of a submission agreement ("*compromis*").

#### 1. Arbitration Clause in a Commercial Agreement (Pre-Dispute)

In order for competition claims to be addressed by arbitral tribunals, they must fall within the scope of the relevant arbitration clause (*ratione materiae*).

Once it is determined that the parties have consented to arbitration in the first place, the scope of their agreement to arbitrate will be interpreted extensively, in an all-embracing manner.<sup>19</sup> A broadly drafted arbitration clause, such as one containing words like "arising out of or in connection with" will cover extra-contractual matter, and thus also competition claims.<sup>20</sup> In such a case, the arbitral tribunal has a *duty* under Swiss law to take jurisdiction over the competition claims.<sup>21</sup>

#### 2. Submission Agreements (Post-Dispute)

The parties may have an interest in agreeing to subject their dispute to arbitration even if their original contract did not foresee this possibility, and they are free to opt for arbitration *after* the dispute arises.

Not only do all jurisdictions not have specialized courts and experts able to handle such complex matters, but arbitration also allows the parties to preserve confidentiality, which may serve the interests of both.

Arbitrators may be chosen specifically for their expertise in areas which are considered predominantly important for the handling of a case. Arbitrators may be selected for their knowledge in competition law or economic matters, in addition to arbitration as such. Moreover, arbitration proceedings allow flexibility regarding the appointment of experts by the parties or the arbitral tribunal. In addition, the proceedings may more easily be arranged to favor a prompt resolution of the dispute, based on the legal and practical priorities of the case and the interconnection between economics and law.

Independently from purely competition law disputes, the preference for arbitration when it comes to large scale cross-border disputes is undeniable. Disputes involving competition law issues almost invariably arise in an international context, whereby international arbitration has been by far the preferred means of resolving cross-border disputes. The traditional arguments in favor of arbitration remain valid in respect of competition law disputes, namely confidentiality, expertise of the decision makers, flexibility, and enforcement of awards abroad.

The parties involved in a potentially complex dispute, including arguments pertaining to competition law, would therefore be well-advised to consider the possibility of agreeing to arbitration *ex post*, even if said dispute resolution mechanism was not included at first in their contractual arrangements.

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<sup>18</sup> ATF 132 III 389 at 3.3.

<sup>19</sup> Swiss Supreme Court Decision 4C.40/2003 of May 19, 2003; Swiss Supreme Court Decision 4A\_103/2011 of September 20, 2011.

<sup>20</sup> The Swiss Supreme Court has interpreted "in connection with" as implying a "broad and comprehensive arbitration clause covering not only contractual claims but also extra-contractual ones." (Swiss Supreme Court Decision 4A\_119/2012 of August 6, 2012 at 4.3).

<sup>21</sup> An arbitral award can be set aside under Article 190 para. 2 let. b PILA if the arbitral tribunal has wrongly declined jurisdiction to hear antitrust claims: ATF 118 II 193.

### III. HANDLING OF THE DISPUTE

#### A. Preliminary Assessment of the Existence of a Competition Law Offense

The assessment of a dispute which concerns financial interests may also involve the assessment of a preliminary question that does not relate to a financial interest (e.g. the existence of criminal actions compromising a contract's validity, the valid existence of a legal entity, the validity of a foreign intellectual property right, etc.). In such cases, the arbitral tribunal is also competent to assess these preliminary questions. Its judgement may include these additional issues as part of the determination of the dispute over a financial interest; however, it does not modify any legal relationship or legal status.<sup>22</sup> The Swiss Supreme Court recently confirmed that arbitral tribunals have jurisdiction to deal with the alleged existence of a crime as a preliminary issue.<sup>23</sup> The same principle would apply regarding the preliminary assessment of the existence of a competition law offense.

As we know, assessing the existence of a competition law offense may entail complex legal and economic analysis, as well as particularly intense fact findings by the parties.

Regarding the economic analysis, the recourse to experts appears as a natural solution. Such experts can be involved both as party-appointed experts and as experts appointed by the arbitral tribunal. Fact finding, on the other hand, mainly relies on the parties. Arbitration may be advantageous in the sense that, while not going as far as a fully-fledged discovery mechanism, most arbitration rules allow parties and arbitrators to order the production of documents, with more flexibility than a number of national jurisdictions, the IBA Rules on the Taking of Evidence in International Arbitration of 2010 being often referred to as an applicable standard. Another complexity of the preliminary assessment may pertain to the interpretation of the rules of law, in particular competition rules. The possibility to request the support of the competition authorities must therefore be envisaged.

#### B. Prejudicial Questions/Opinion from Competition Authorities

Under European law, a civil procedure can be stayed at first instance, and a national court can refer a question to the European Court of Justice for preliminary Judgement, to promote the uniform application of European law. This procedure is not open to arbitrators, according to the case law set by the European Court of Justice.<sup>24</sup>

It is uncertain whether Article 15 of Council Regulation 1/2003<sup>25</sup> on the cooperation between national courts and the Commission applies in arbitral proceedings, in particular whether arbitrators can benefit from the support of the Commission under Article 15 para. 1 Reg. 1/2003 or whether the Commission and national competition authorities can intervene in an arbitration as *amicus curiae* under Article 15 para. 3. Reg. 1/2003.

In Switzerland, Article 15 of the Cartel Act ("CartA") provides that "If the legality of a restraint of competition is questioned in the course of civil proceedings, the case shall be referred to the Competition Commission for an expert report."<sup>26</sup> Though the legal provision does not explicitly deal with the question, the prevailing opinion of authors is that arbitrators can request the opinion of the national competition authority pursuant to Article 15 al. 1 CartA, but have no duty to do so.<sup>27</sup> To date, to our knowledge no Swiss arbitral tribunal has involved the Swiss competition authorities.

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22 ATF 133 III 139 at 5.

23 Swiss Supreme Court Decision 4A\_597/2013 of June 19, 2014 at 4.2 with reference to ATF 133 III 139 at 5; see ASA Bul. 2014 pp. 775/777 and 779.

24 *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG* (1982) ECR 1905 Case 102/81.

25 Council Regulation (EC) No 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance), *OJ L 1, 4.1.2003*, pp. 1-25 (Reg. 1/2003).

26 Article 15 Cartel Act (CartA).

27 J.-M. Reymond in: *Commentaire Romand, Droit de la concurrence*, V. Martenet, P. Tercier & Ch. Bovet (eds), 2<sup>nd</sup> ed., Basel, 2013, Art. 15 LCart N. 141ff.; P. Krauskopf & S. Roth, *SJ 2002 II* p. 43 para. 22d.



As Switzerland is not a member of the European Union, the decisions of arbitral tribunals seated in Switzerland are not subject to the review of EU courts and competition authorities, meaning that they may follow their own interpretation of EU competition rules. This being said, an arbitral award rendered in Switzerland that would contravene EU public order would be unenforceable in the territory of the European Union, which imposes a degree of self-discipline to arbitral tribunals in charge of interpreting EU competition rules.

### ***C. Award***

Arbitral tribunals may not only decide on the payment of monies, but can also issue injunctive orders.

Arbitral tribunals may therefore, on the merits of a case or as an interim measure:

- prevent a party from terminating a contract;
- extend the temporal validity of a contract;
- order a party to enter into a contract.

While the award on financial claims will most often be issued at the end of the procedure with the judgement based on the merits of the case, provisional measures aiming at preserving the situation and avoiding irreparable harm may include the measures listed above, which may be particularly relevant in connection with competition issues. Sometimes, monetary compensation does not suffice to prevent the disappearance of a competitor or business partner.

## **IV. DAMAGES**

### ***A. Award of Damages***

Switzerland is no exception to the rule. Damages for breach of contract or tort may be awarded by courts, including arbitral tribunals.

While damages for breach of contract are governed by principles of liability which can be considered quite standard, so that we will not further develop this point, it is worth mentioning the rules governing extra-contractual liability, namely Articles 41 *et seq.* of the Swiss Code of Obligations (“SCO”).

According to Article 42 para. 1 SCO, “a person claiming damages must prove that loss or damage occurred.” Nevertheless, according to Article 42 para. 2 SCO, “where the exact value of the loss or damage cannot be quantified, the court shall estimate the value at its discretion in the light of the normal course of events and the steps taken by the injured party.”

Swiss law does not allow a claimant to merely allege a damage. The burden of proving the damage remains. However, the burden is somewhat alleviated by the possibility for the judge or arbitrator to substitute its own appreciation to the proof of the “exact value” of the loss or damage.

Switzerland may therefore appear as a jurisdiction that does not go as far as including lump sum calculations of the damages or requiring strict evidence of the exact amount of the damage claimed. As often occurs, Swiss law sets forth an intermediate and reasonable solution, with the possibility of mitigating the risks of both parties, in one sense or the other.

It is to be noted that the EU Directive on competition law damages actions<sup>28</sup> would not have to be taken into account in an arbitration seated in Switzerland in case the applicable law on the merits is not the law of an EU country (e.g. Swiss law).

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<sup>28</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, OJ L 349, 5.12.2014, pp. 1-19 (EU Directive on damages).

## ***B. Award of Punitive/Treble Damages***

Swiss law does not provide for punitive/treble damages. However, there might be situations where such damages could be awarded by an arbitral tribunal seated in Switzerland, if substantive laws governing the dispute provide for such damages.

In such case, an arbitral tribunal seated in Switzerland does not, in principle, violate public policy by awarding punitive/treble damages, if the tribunal deems it appropriate to award such damages and the applicable foreign law provides for such damages, according to the case law of the Swiss Supreme Court.<sup>29</sup>

The above implies that arbitration in Switzerland may also appear attractive for claimants seeking to obtain punitive/treble damages.

## **V. AWARD SET ASIDE/REVIEW OF FOREIGN LAW**

In Switzerland, the grounds for annulment of an arbitral award are particularly limited.

Arbitral awards are subject to a direct action for annulment to the Swiss Supreme Court (provided such possibility was not excluded in the agreement to arbitrate by the parties)<sup>30</sup> and the grounds that may be invoked by the parties to annul the award are limited to the following:<sup>31</sup>

- a) if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;*
- b) if the arbitral tribunal has wrongly accepted or declined jurisdiction;*
- c) if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim;*
- d) if the principle of equal treatment of the parties or the right of the parties to be heard was violated;*
- e) if the award is incompatible with public policy.*

The standard of review applied by the Swiss Supreme Court to annulment actions is deferential. Challenges are successful only in extreme cases, approximately 7 percent of the time, and only two arbitral awards were considered contrary to public policy from the entry into force of the PILA in 1989 to date, both issued by the Court of Arbitration for Sport and not concerning commercial matters. The Swiss Supreme Court is swift in dealing with annulment actions, rendering its decision usually within 4 to 6 months.<sup>32</sup>

As mentioned, an arbitral tribunal examining the performance of a contract may also review such contract's compatibility with EU competition law applying to the parties involved.<sup>33</sup> However, an arbitral award cannot be set aside for the mere misapplication of a foreign competition statute by the arbitral tribunal. Indeed, misapplication of the law would fall within the realm of determining the merits of the case, and the only possibility for an award to be set aside in such context is when it violates public policy.<sup>34</sup> As previously explained, non-application or incorrect application of a foreign competition statute does not constitute a violation of public policy, so that the possibility to challenge the award for such grounds before the Swiss Supreme Court is excluded.<sup>35</sup>

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<sup>29</sup> Swiss Supreme Court Decision 4P.7/1998 of September 17, 1998 at 3c.

<sup>30</sup> Article 192 PILA. Parties may avail themselves of this option, however, only where none of the parties has its domicile in Switzerland and the waiver is clear and specific.

<sup>31</sup> Article 190 para. 2 PILA.

<sup>32</sup> F. Dasser, *International Arbitration and Setting Aside Proceedings in Switzerland – An Updated Statistical Analysis*, ASA Bul. 2010, N 28, Issue 1, pp. 82-100.

<sup>33</sup> ATF 118 II 193 at 5c/bb.

<sup>34</sup> Article 190 para. 2 let. e PILA.

<sup>35</sup> ATF 132 III 389.



## VI. ENFORCEABILITY OF THE AWARD

As arbitrators have a duty to render an enforceable award, they may find themselves in a situation where they need to raise competition law issues *ex officio*, a rather unusual way to proceed in arbitration, given the consensual nature of the procedure.

As seen, competition laws were not considered to be public policy issues by the Swiss Supreme Court.<sup>36</sup> In such a context, the potential risk that an arbitral award may not be subsequently enforced abroad was deliberately accepted by the Swiss legislator and rests solely upon the parties.<sup>37</sup> However, the risk of non-recognition abroad is not a sufficient reason to take into account a more restrictive rule than Article 177 para. 1 PILA, according to the case law cited by the Swiss Supreme Court.<sup>38</sup>

## VII. CONCLUSION

Switzerland is a very attractive place for arbitrating competition matters, both when raised defensively and for affirming competition claims. Ranked among the top three countries in the ICC statistics both for the seat of the arbitration and for the nationality of arbitrators, Switzerland benefits from its political neutrality and arbitration-friendly legislation and courts, which ensure that the review of the award by Swiss state courts will be strictly limited.

Considering the nature and object of disputes involving competition law arguments, the parties should carefully consider the possibility to agree to arbitrate their dispute, thus benefiting from the advantages of this type of dispute resolution mechanisms.

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<sup>36</sup> See Section 2.2.2.

<sup>37</sup> Swiss Supreme Court Decision 4A\_388/2012 of March 18, 2013 at 3.3; ATF 118 II 353 at 3c.

<sup>38</sup> ATF 118 II 387 at 3d.



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