English translation[1] of the decision of the Swiss Supreme Court ("Federal Tribunal") of March 8, 2006 in the case of *Tensaccia S.P.A v. Freyssinet Terra Armata .R.L.*

4P.278/2005

Judgement of March 8, 2006
1st Civil Court

Judges CORBOZ presiding, ROTTENBERG LIATOWITSCH, NYFELER, FAVRE AND KISS
Clerk: M. CARRUZZO

X. _____ S.p.A.,

Appellant, represented by Mr. GIOVANNI, M. ROSSI and Mr. Mathis KERN

v.

Y. _____ S.r.l.,

Respondent, represented by Mr. Elliott GEISINGER

ICC Arbitration Tribunal in Lausanne

International arbitration; public policy; EU competition law;

Public law appeal against the award of the ICC Arbitral Tribunal of September 12, 2005

Facts:

A.
X.[2] _____ S.p.A (hereafter: "X. _____" or "the Appellant") and Y. _____ S.r.l. (previously Z. _____ S.r.l.; hereafter "Z. _____" or "the Respondent"), two Italian companies, are major players, at world level, in the field of riggings and cables.

Pursuant to a contract of May 26, 1998, the two companies undertook to present jointly their offers for the application of their technologies in

[1] By Dr. Charles PONCET, Partner, ZPG Geneva.

[2] The original of the decision, in conformity with Swiss practice, did not disclose the names of the parties. As they were referred simply as "X", "Y" or "Z" in the original version, this has been kept in the translation.

connection with the construction of two bridges on the high speed railroad line planned between Milan and Naples. Their cooperation was on an exclusive basis, to the extent that each company undertook to refrain from any separate agreements with other companies and from bidding individually in answer to the tenders. Governed by Italian law, the contract contained an arbitration clause setting the venue of the arbitration in Lausanne and providing for the application of the arbitration rules of the International Chamber of Commerce (ICC).

Based on the aforesaid contract, the parties submitted joint offers for the works tendered. Previously, they consulted each other to set the amount of their offers.

The construction works were adjudicated to X. _____ and to some consortiums created by X. _____ and other companies.

B.
Holding itself harmed by its co-contractor's behaviour, Z. _____ sent an arbitration request to the ICC on September 13, 2002, with a view to obtaining damages, the amount of which was subsequently set at about € 4'250'000.

X. _____ submitted that the request should be denied because the contract in dispute was void under Italian and European competition laws.

In a final award of September 12, 2005, the ICC Arbitral Tribunal, composed of three arbitrators, ordered X. _____ to pay to Z. _____ the amount of € 488'258, with interest. The Arbitral Tribunal essentially held that the contract between the parties was valid under Italian and European competition laws, so that X. _____, which had gravely and voluntarily violated its obligations under the contract, was to compensate Z. _____ of the entire damage thus sustained.

C.
X. _____ filed a public law appeal within the meaning of art. 85 (c) of the Statute Organizing Federal Courts ("OJ"). Relying on the ground for appeal at art. 190 (2) (e) of the Private International Law ("PILA"), X. _____, asked the Federal Tribunal to overturn the award of September 12, 2005. According to the Appellant, the Arbitral Tribunal issued an award inconsistent with public policy because the award disregarded fundamental provisions of European and Italian competition laws.

The Respondent submitted that the appeal should not be allowed and, subsidiarily, that it should be rejected. The Arbitral Tribunal did not express a view on the appeal.

A petition to stay the proceedings was submitted by the Appellant and rejected by decision of the Presiding Judge of December 14, 2005.

Whereas:

1.
1.1 Timely filed (art. 89 (1) OJ) and as prescribed by law (art. 90 (1) OJ), against a final award issued in an international arbitration (art. 176 ff PILA), this public law appeal, instituted by art. 85 (c) OJ, in which only one of the grounds for appeals of art. 190 (2) PILA is invoked, meets the aforesaid requirements. The party filing the appeal has standing to appeal (art. 88 OJ), as it has a personal and present interest, legally protected, to prevent the Arbitral Tribunal from issuing an award inconsistent with public policy (art. 190 (2) (e) PILA).

1.2
1.2.1 The Respondent submits that the appeal should not be allowed on the ground that competition laws, whether European or Italian, would not fall within the concept of public policy of art. 190 (2) (e) PILA. According to Respondent, the Appellant would be trying to obtain from the Federal Tribunal a review of the award on the merits, with a complete examination of both the application of the law as well as the assessment of the evidence.

Such an opinion cannot be followed. Whether or not the provisions of the competition laws of either Europe or the *lex causae* are elements of public policy as understood in Swiss international arbitration law and, in the affirmative, defining the power of review of the Federal Tribunal in a public law appeal based on the violation of one of the aforesaid dispositions, are issues relating to the pertinence of the ground for appeal advanced, which is not a pre-condition for allowing the appeal. From that point of view, it is sufficient that the ground alleged meets the formal requirements germane to the appeal instituted by art. 85 (c) OJ. Such is the case here: the Appellant sets forth the reasons for which European or Italian competition laws fall within the scope of art. 190 (2) (e) PILA and the Appellant argues, with motivations, that the Arbitral Tribunal neither interpreted nor applied that law correctly.

1.2.2 When the decision under appeal was based on several independent motivations, whether alternative or subsidiary, all *per se* sufficient, each must be attacked with the appropriate ground for appeal, under penalty of the appeal being disallowed (ATF 115 II 300 at 2a; 111 II 398 at 2b). This principle also applies to public law appeals within the meaning of art. 85 (c) OJ (Judgement 4P.62/2004 December 1st, 2004, at 2.1 and the references).

Relying on the aforesaid principle, the Respondent sets forth that the Arbitral Tribunal reviewed the validity of the contract in dispute on the basis of

European and Italian competition laws with a view to both the object and the results of the contract. According to the Respondent, however, the Appellant abstained from criticizing the award under appeal to the extent that the Appellant conceded the validity of the contract as to its results and criticised the award in a procedurally unacceptable manner by conceding the absence of illegality of the contract with regard to its purpose. By leaving intact one of the two alternate motivations on which the award is based and by setting forth only procedurally unacceptable challenges against the other motivations, the Appellant would accordingly have filed an appeal, which should be entirely disallowed according to the Respondent.

Not at all. First, the argument that the second alternate motivation would be procedurally unacceptable fails for the reasons indicated above (see 1.2.1). Moreover, this case does not feature a true alternate motivation. This is simply a case where the Arbitral Tribunal reviewed two restrictions to competition alternate to each other, *i.e.* each capable of causing the contract to be null. The Respondent was indeed aware of that when it conceded that a contract the object of which violates European or Italian competition laws would be void on that ground alone, without it being necessary to also enquire if it was also void due to its results. In other words, were this Court, sharing the Appellant's view, to reach the conclusion that the Arbitrators issued an award inconsistent with public policy by not finding that the object of the contract was illicit, we would have to overturn the award under appeal, even though the Arbitral Tribunal may have rightly found the contract valid from the point of view of its results.

This being said, there is no reason not to entertain the appeal.

1.2.3 The Appellant starts by qualifying the contract in dispute before setting forth precisely the respective fields of application of European and Italian competition laws. The Appellant then seeks to demonstrate that the award under appeal contained a violation of fundamental principles arising from these laws, such principles being common to most industrialized states, the jurisdictions of which would review *ex officio* their application by Arbitral Tribunals. Finally, the Appellant devotes five pages only in an appeal containing some forty pages to explaining why, in its view, the legal principles violated fall within the scope of public policy as defined at art. 190 (2) (e) PILA.

Arguing in this way is a sin against logic. Indeed, assuming that the provisions of European or Italian competition laws could not be tied to public policy as understood by the aforesaid provision, it would be useless to research whether or not these provisions were disregarded by the Arbitral Tribunal, which, incidentally, would also require the Federal Tribunal to first define its power of review in this area, whether with regard to the pertinent facts or as to the

application of the pertinent rules of law. It is much more appropriate to decide first the issue as to whether or not European or Italian competition laws belong to the principles the violation of which is inconsistent with public policy as defined by art. 190 (2) (e) PILA.

2.

2.1 Art. 190 (2) PILA provides that an award may be appealed when it is inconsistent with public policy. Public policy is an undetermined legal concept, which is difficult to assess and which hardly lends itself to a definition by rule of thumb. This finding, made by the Federal Tribunal more than ten years ago in its seminal decision United Arab Emirates *et al. v.* Westland Helicopters Ltd (ATF 120 II 155 at 6a p. 168) is still valid today. The essence, the nature and the boundaries of public policy remain fleeting (François Knoepfler/Philippe Schweizer/Simon Othenin-Girard, Droit international privé Suisse, 3e éd, n. 776f, p. 457). Some compared the concept to a chameleon due its changing appearance (Philippe Schweizer, L'ordre public de l'article 190 al. 2 lit. e LDIP: le caméléon court toujours, in Mélanges en l'honneur de Bernard Dutoit, Genève 2002, p. 217 ss, referring to the latter's article : "L'ordre public : caméléon du droit international privé ?" published in Mélanges Guy Flattet, Lausanne 1985, p. 455 ss). The fleeting character of public policy may be inherent to the concept, due to its excessive generality ; the wide scope of the almost countless opinions proffered in this regard would tend to prove it (for an outline of the various opinions see among others : Homayon Arfazadeh, Ordre public et arbitrage international à l'épreuve de la mondialisation, Genève/Zurich/Bâle 2005, p. 136, note 342 and before; Antonio Rigozzi, L'arbitrage international en matière de sport [hereafter: "Sport"], Bâle 2005, N. 1417 à 1430). As a commentator pointed out, all attempts to answer the numerous recurring questions raised by the interpretation of this concept merely resulted in raising further thorny or polemical questions (Arfazadeh, op. cit., p. 136). It is legitimate to ask to what extent the scholarly dispute on the boundaries of public policy as defined by art. 190 (2) (e) PILA really serves an effective purpose, at least in practical terms, as it is only very seldom that an international arbitral award will be overturned on that ground (see Bernard Corboz, Le recours au Tribunal federal en matière d'arbitrage international, in SJ 2002 II P. 1 ss, 25; for other references see: Schweizer, op. cit., p.279, note 64). This somewhat pessimistic finding as to the possibility to define once and for all the concept of public policy would rather tend to encourage the Federal Tribunal to approach this controversial issue pragmatically, as it already recommended in the aforesaid Westland decision, from which this Court never departed since. Perhaps the ability to foresee the law may not be well served in this manner. However, the importance of such an inconvenient should not be exaggerated: on the one hand, although they remain relatively fuzzy, the limits of public policy in international arbitration were nonetheless drawn, perhaps broadly, by abundant case law (for a detailed review of case law, see Christoph Müller, International Arbitration, Zurich/Bâle/Genève 2004, p. 170 ss); on the

other hand, it must by now be clear to whoever enters into an arbitration agreement calling for the application of art. 176 ff PILA, that the chances of success will be extremely thin the day one may wish to challenge an arbitral award on the basis of art. 190 (2) (e) PILA (Corboz, op. cit., p. 30 in fine).

This being said, a reminder of the concept of public policy in Swiss case law and a few remarks appear necessary to decide the issue in front of the Federal Tribunal.

2.2
2.2.1 Material public policy should be distinguished from procedural public policy. In its most recent decisions, the Federal Tribunal defined both concepts as follows (Judgement 4P.280/2005 of January 9, 2005 at 2.1 and the references).

Procedural public policy guarantees to the parties the right to an independent judgement issued consistently with applicable procedural law as to the submissions and the facts submitted to the Arbitral Tribunal; procedural public policy is violated when fundamental and generally recognised principles were not respected, thus leading to an unsustainable contradiction with the sentiment of justice, so that the decision appears inconsistent with the values recognized by a state ruled by law.

An award is contrary to material public policy when it violates fundamental principles of material law in such a serious way that it is no longer consistent with the legal order and the pertinent system of values; amongst such principles are contractual trust, the respect for the rules of good faith, the prohibition of abuse of rights, the prohibition of discriminatory or confiscatory measures, as well as the protection of incapable persons.

2.2.2 It has been agreed for a long time that the public policy aimed at by art. 190 (2) (e) PILA is merely a reservation clause, meant to protect fundamental and broadly recognised values and that it is a narrower concept than arbitrariness (ATF 120 II 155 at 6a; Rigozzi, Sport, n. 1403 ss; Hans Peter Walter, Willkür und Odre public-Widrigkeit: Ein ungleiches Geschwisterpaar in schiedsgerichlichen Anferchtungsverfahren, in Festschrift für Franz Kellerhals, Berne 2005, p. 109 ss).

As to anchoring public policy, particularly its material component, and as to knowing whether it is Swiss international public policy or a transnational public policy of universal bearing, legal writers noticed and deplored "the waltzes of the definitions of the Federal Tribunal" (Rigozzi, Sport, n. 1418 ff) and, accordingly, the fluctuating character of case law relative to this issue (Knoepfler/Schweizer/Othenin-Girard, ibid.). It cannot be denied that the formulation of case law in this field is somewhat confusing: essentially, it refers

sometimes to a transnational or universal public policy with a view to sanctioning the incompatibility of the award with the "fundamental legal and moral principles recognised in all civilised states" (ATF 128 III 234 at 4c p. 243) or those predominating in a "state ruled by law" (ATF 128 III 191 at 4a p. 194), or sometimes to "the determining legal order and system of values" (Judgement 4P.98/2005 of November 10, 2005, at. 5.2.1) or still to "the legal order taken into consideration, namely the essential legal values which every decision must abide by" (Judgement 4P.221/1991 of March 13, 1992, at 2a); at other times, case law turns itself into the guardian of "the most essential principles of the legal order as it is conceived in Switzerland" (Judgement 4P.253/2004 of April 8, 2005, at 3.1); finally, the issue as to which applicable system should be referred to is sometimes not decided (ATF 117 II 604 at 3 *in fine*). It must be acknowledged that some of the aforesaid formulations leave much to be desired and they have indeed been criticised. To invoke some essential values to be respected or a determining system of values is actually not very clear as by doing so, one does not make it possible to understand which values or which system are referred to (Schweizer, op. cit. p. 275). Speaking of values, which civilized states would have in common may not be politically correct as it implies a division of the world in two parts (Schweizer, op. cit., p. 279).

Justified as it may be, such terminological criticism does not call for a fundamental questioning of the case law, which the Federal Tribunal patiently built in the last fifteen years, by approximations certainly, but always along the same guiding line. Moreover, the lack of coherence of case law with regard to art. 190 (2) (e) PILA is more apparent than real and the wordings used are coated in a way that hides a certain continuity in the approach of a concept, which will always remain relatively impossible to grasp. The consistency of the list of examples set forth by the Federal Tribunal in each decision describing the contents of material public policy illustrates the point perfectly.

Generally speaking, case law strived to free the public policy of art. 190 (2) (e) PILA from any national connection, whether the *lex fori*, the *lex causae* or the law of a third country. This is because the ground of appeal set forth in that provision does not aim at protecting the Swiss legal order and neither does it purport to sanction the failure to apply - or the improper application of - the foreign law governing the merits of the dispute, even if it were binding and nor does it sanction the failure to consider an immediately applicable mandatory provision of a third state.

Even though the public policy reservation is broadly acknowledged (cf. Jette Beulker, Die Eingriffsnormenproblematik in internationalen Schiedsverfahren, Tübingen 2005, p. 49 in limine), it behooves nonetheless the Swiss judge to interpret art. 190 (2) (e) PILA when relied upon as a ground for appeal and to determine what the Swiss legislator had in mind when it adopted this

undetermined legal concept. It is not sure that the same principles would be considered as fundamental on the entire planet (Corboz, Op. cit., p. 25), as the diversity of civilisations may perfectly well justify fundamental principles of different or event opposed nature (Jean-François Poudret/Sébastien Besson, Droit comparé de l'arbitrage international, p. 814, n. 826). Thus, the Swiss lawmakers, when choosing the terms "public policy", necessarily had in mind the system of values prevailing in the part of the world where the country of which they are entrusted with adopting the laws is located, as well as the founding principles of the civilisations to which this country belongs. The Swiss judge's work, when deciding an appeal in the field of international arbitration, is therefore to seek the principles flowing from that system of values and to verify if the award under review is consistent with them.

This is what reveals the ambivalent nature of the public policy referred to at art. 190 (2) (e) PILA. On the one hand, it is a safety valve helping to preserve the fundamental rules of which, ideally, every state should ensure that they are respected, whilst, if necessary, sanctioning an award, however consistent with applicable procedural and material laws it may otherwise be. This is the function of the public policy reservation extending beyond the boundaries of national systems of law. On the other hand, the Swiss judge, who does not live in a no man's land but in a country attached to a given civilisation where certain values are privileged as opposed to others, is led to identify these principles with his own sensitivity and on the basis of the essential values shared by this civilisation; this is the Swiss component of the public policy reservation.

2.2.3 This brief overview of the concept of public policy shows once again that it is relatively unseazable. Assuming a definition is needed, one could say that an award is inconsistent with public policy if it disregards those essential and broadly recognised values which, according to the prevailing values in Switzerland, should be the founding stones of any legal order.

2.3 It is necessary to examine if European or Italian competition laws are amongst such values.

3.
3.1 Restrictions to competition may manifest horizontally in the relationships between private business operators amongst themselves and vertically in the relationship between the state and private individuals. To ensure the horizontal guarantee of economic freedom, the Swiss Constitution gave the Federal Government authority to legislate against the socially and economically damaging consequences of cartels and other forms of restraint of competition (art. 31bis al. 3 let. d a Cst., subsequently art. 96 al. 1 Cst.). Accordingly, the federal legislator adopted the Law On Cartels and Other Restrictions to Competition of October 6, 1995 (LCart; RS 251). As stated in its first article, in

order to redress such consequences, that law seeks to promote competition in the interest of a market economy based on a liberal regime.

A preoccupation with preventing restrictions to competition is not a Swiss monopoly. The main industrialized states share the same concerns and some developing countries are not insensitive to it as the Appellant demonstrated. At the European level, the fight against cartels is one of the battle horses of the Union and art. 81 (formerly 85) of the Treaty instituting the European Community (EC) is its main weapon.

This being said, it would be presumptuous to take the view that European or Swiss concepts in the field of competition law should evidently be imposed to all the states of the planet as a panacea, because such concepts are tied to a certain type of economy and to a certain regime (art. 1 LCart). Swiss law itself acknowledges that not all restrictions to competition are damaging (art. 5 (2) (a) LCart) and it excludes certain goods or services from free competition. Other models, based on a more planned economy and emphasizing the intervention of the State in the economy, existed in the past and still exist. No one would hold them out as immoral or contrary to the fundamental principles of law for the simple reason that they depart from the Swiss model. Actually, it appears that despite the efforts made to emphasize a convergence of the various solutions adopted in the field of competition law, it is an area which hardly lends itself to an analysis in terms of universal morals (Philippe Fouchard/Emmanuel Gaillard/ Berthold Goldman, Traité de l'arbitrage international, n. 1524 in fine) and the thesis of a substantial public policy of *lex mercatoria* in competition law appears, for the time being, to remain utopia (Laurence Idot, Les conflits de loi en droit de la concurrence, in Journal du droit international privé 1995, p. 321 ss, 328). Indeed, this is a technical field in which the results sought may be reached or enhanced in various ways. As to finding a common denominator to the existing state laws with a view to deriving from them a principle which could be tied to public policy, this is an endeavour which would not necessarily meet success whilst most probably not leading to a definition derived from art. 81 EC (Knoepfler/Schweizer, p. 443, n. 4). In reality, the differences between the various laws on competition are too acute – specially between Switzerland and the European Union – to allow a finding that a transnational or international rule public policy would have to be found there (Poudret/Besson, op.cit, n. 707, p. 650 in fine)

The foregoing is not disproved by the fact that the Court of Justice of the European Communities ties art. 81 EC to the public policy of the member states and holds it as a provision of public policy within the meaning of the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (RS 0.277.12) (Judgement of June 1st, 1999 in case C 126/97, Eco Swiss China Time Ltd c. Benetton International NV, at 36 and 38; on this decision, see Antonio Rigozzi, Arbitrage, ordre public et droit

communautaire de la concurrence (hereafter "Arbitrage"), in: Bulletin de l'Association suisse de l'arbitrage (ASA) 1999, p. 455 ss). The Court itself narrowed the scope of its conclusion by pointing out that art. 81 EC is qualified as public policy because it is a "fundamental provision, indispensable to carry out the missions entrusted to the Community and, particularly, to the smooth functioning of the internal market" (case quoted, at 36; see also Georges Karydis, L'ordre public dans l'ordre juridique communautaire: un concept à contenu variable, in Revue trimestrielle de droit européen 2002, p. 11 ss, 13). Such a qualification, conditioned by the necessity to protect the public interest of the community is thus given a limited scope in space and one could not draw from it a more general and undisputed principle, which all countries claiming to belong to the same civilisation as Switzerland would share in common. Moreover, the mandatory nature of the public policy of the European Union in the field of competition is tied to the existence of internal procedural rules making it mandatory for a National Court to grant a request for annulment based on the disregard of the rules of national public policy (decision quoted, point 41, Karydis, op.cit., p. 14) and the enforcement of art. 81 EC also depends on the powers of review of the National Court seized of an appeal against an arbitral award (for an example of severely restricted powers of judicial review see the decision SA Thalès Air Défense c. GIE Euromissile of November 18, 2004 by the Paris Court of Appeal published in Revue de l'arbitrage 2005, p. 750 ss; also see, ibid. p. 529 ss, Professor Luca G. Radicati di Brozolo's article: L'illicéité "qui crève les yeux": critère de contrôle des sentences au regard de l'ordre public international).

3.2 Twice at least, the Federal Tribunal already stated that it was doubtful that a violation of European or national competition laws could be held contrary to public policy as defined by this Court (ATF 128 III 234 at 4c p. 243; Judgement 4P.119/1998 of November 13, 1998, at 1b/bb, published in Bulletin ASA 1999, p. 529 ss). Legal writers are practically unanimous in acknowledging that the doubts expressed by the highest court of the land are consistent with the concept of public policy as described in case law (in addition to the commentators referred to there, see: Knoepfler/Schweizer, p. 442, n. 4; Rigozzi, Arbitrage, p. 474; Schweizer, op.cit., p. 280; Poudret/Besson, n. 707, p. 650 in fine; Cesare Jermini, Die Anfechtung der Schiedssprüche im internationalen Privatrecht, Zurich 1997, no. 598; Stephen V. Berti/Anton K. Schnyder, Commentaire bâlois, n. 79 ad art. 190 LDIP; Arfazadeh, op.cit., p. 283; Francesco Trezzini, The Challenge of Arbitral Awards for Breach of Public Policy according to art. 190 para 2 let e) of the Swiss Private International Law, in: Three Essays on International Commercial Arbitration, Lugano 2003, p. 109 ss, spec. n. 171, p. 225; also see for a less categorical view: Anton Heini, Commentaire zurichois, nr. 45 ad art. 190 LDIP, p. 2074).

After reviewing once again the concept of public policy (above at. 2) and after examining further the nature of European Competition Law (above at 3.1) this Court holds that there is no more room for doubt: the provisions of competition laws, whatever they may be, do not belong to the essential and broadly recognized values which, according to the concepts prevailing in Switzerland, would have to be found in any legal order. Consequently, the violation of such a provision does not fall within the scope of art. 190 (2) (e) PILA. The possibility of such a violation affecting one of the principles that case law deducted from the concept of material public policy is hereby reserved (see above at 2.2.1).

3.3 According to case law, an arbitrator entrusted with deciding the validity of a contractual agreement affecting the market of the European Union will decide the issue on the basis of art. 85 (presently 81) EC, even though the parties may not have agreed to the application of Swiss law to their contractual relationship. Such examination will certainly be necessary if in front of the arbitrator one of the parties claims that the contract is void. An arbitrator denying jurisdiction to do so would be violating art. 190 (2) (b) LDIP (judgement 4P.119/1998, quoted above, at 1a; ATF 118 II 193 at 5). Some legal writers hold the view that it is paradoxical and somewhat artificial to compel an arbitrator to review the validity of a contract on the basis of a foreign mandatory law whilst abstaining from reviewing the manner in which that law was applied because it would not be part of public policy (Arfazadeh, op.cit., p. 248; Poudret/Besson, op.cit, n. 353, p. 321; Rigozzi, Sport, n. 1439, p. 726, 1st §). The Federal Tribunal has been criticized for, amongst other things, dealing with the same issue – *i.e.* the arbitrator's duty to take into account European law – in a different manner depending on the purely formal way in which the appeal is brought to this Court: jurisdiction of the Arbitral Tribunal (art. 190 (2) (b) PILA) or violation of public policy (art. 190 (2) (e) PILA) (Bernard Dutoit, Commentaire de la loi fédérale du 18 décembre 1987, 4e ed, n. 5 ad art. 190 PILA, p. 669). However, as pointed out by Antonio Rigozzi (Arbitrage, p. 474), the contradiction is only apparent if one bears in mind that in its Westland judgement, the Federal Tribunal stated that public policy within the meaning of art. 190 (2) (e) PILA should be distinguished from public policy as to how the Arbitral Tribunal applied the law (ATF 120 II 155 at 6a p. 168 in limine). In other words, the arbitrator's public policy is not the public policy of the appeal judge. Thus, there is no contradiction between holding that the Arbitral Tribunal would violate art. 190 (2) (b) PILA (in connection with art. 187 (1) PILA) by denying jurisdiction to examine the application of a foreign mandatory law, such as European or Italian competition laws, when asked to do so by a party, whilst also refusing to review the way in which an Arbitral Tribunal applied the same law because it does not belong to the realm of public policy as defined at art. 190 (2) (e) PILA.

Moreover, this solution makes it possible to avoid the difficulties the Federal Tribunal may otherwise have to wrestle with if this Court had to engage into that type of review (in this respect, see Gabrielle Kaufmann-Kohler, L'ordre public d'envoi ou la notion d'ordre public en matière d'annulation des sentences arbitrales, in Revue Suisse de droit international et de droit européen (RSDIE) 1993, p. 273 ss, 278). Moreover, if the Federal Tribunal were bound to review the manner in which an Arbitral Tribunal applied European law, this Court would not have the possibility to ensure the proper interpretation of such law by seizing the Court of justice of a preliminary issue in this respect, contrary to what the courts of a member state of the European Union are entitled to do (see art. 234 EC). This Court would therefore run the risk to issue judgements in this field which would depart from the case law of the Court of justice and this would create uncertainty and jeopardize the authority of the Supreme Court of the land. Also, the efficiency of the review of the application of European law by the Federal Tribunal would anyway be limited as a consequence of the very narrow review it is entitled to carry out with regard to the factual holdings of the Arbitral Tribunal.

4.
As European or Italian competition laws do not belong to the realm of public policy as stated at art. 190 (2) (e) PILA, this appeal can only be rejected without further analysis of the way in which that law was applied by the Arbitral Tribunal.

5.
Consistently with art. 156 (1) and 159 (1) OJ, the Appellant shall pay the court costs and compensate the Respondent.

Based on the foregoing, the Federal Tribunal holds:
1.
The appeal is rejected.

2.
Judicial costs of CHF 10'000.- shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondent an amount of CHF 12'000.- as legal costs.

4.
This judgement is notified to the representatives of the parties and to the Chairman of the ICC Tribunal.

Lausanne, March 8, 2006

In the name of the 1st Civil Court

of the Swiss Federal Tribunal

The Presiding Judge: Corboz
The Clerk: Carruzzo