

Solution

International Commercial Arbitration - Spring Semester 2022

1a) Solution	Pts
AT's seat in CH	0.25
One party (CC) did not have seat in CH when AA was concluded	0.25
Art. 176 para. 1 PILA	0.25
AT will apply Swiss PILA	0.25
no exclusion according to Art. 176 para. 2 PILA (<i>Bonus</i>)	0.25
Explaining principle of competence-competence: AT shall decide on own jurisdiction	0.5
Art. 186 para. 1 PILA	0.25
principle of competence-competence	0.25
Art. 23 Swiss Rules (<i>Bonus</i>)	0.25
AT shall decide on jurisdiction w/o regard to action having same subject matter that is pending b/w same parties before state court, unless substantial grounds for a stay.	0.5
Art. 186 para. 1bis PILA	0.5
Here no substantial grounds for stay	0.5
Conclusion: Lis pendens principle is of no issue	0.5
convincing remarks regarding 2007 revision / Fomento Case and foreign criticism (<i>Bonus</i>)	0.5
discussing and giving convincing examples of substantial reasons for a stay in procedure (<i>Bonus</i>)	0.5
further convincing remarks/explanations regarding the principle of lis pendens (<i>Bonus</i>)	0.5
Regular Points	4
Bonus Points	2
Maximum Achievable Score	4

1b) Solution	Pts
Question of scope/interpretation of an AA concerns substantive validity	1
Art. 178 para. 2 PILA.	1
Substantive validity must be given by (a) law chosen by parties (b) law governing subject matter or (c) Swiss law.	0.5
PILA is arbitration friendly and uses the favor validatis approach.	1
Here unclear if choice of law. Irrelevant as long as valid under Swiss law. Therefore assessing validity under Swiss law (<i>Bonus</i>).	0.5
Swiss law: Interpretation follows general contract interpretation rules.	0.5
Art. 1 CO requires a mutual expression of intent (<i>Bonus</i>)	0.5
If there is no actual mutual intent (subjective interpretation) the clause is interpreted based on principle of confidence/trust, i.e. as it could and had to be understood in good faith (objective determination; <i>Bonus</i>).	0.5
1) restrictive/narrow interpretation concerning consent to refer to arbitration.	1
Reason: waiver of state courts severely restricts possibility to appeal (<i>Bonus</i>)	0.5
2) once general consent is established, presumption that parties wanted the AT to adjudicate all aspects of their dispute.	1
Here clear mutual intent to waive state courts jurisdiction / to arbitrate	1
AA which refers to "all disputes arising out of the contract" must generally be understood broadly to include claims resulting from the termination of the contract. AA does not need to list all types of potential claims.	1
It would not make sense to exclude claims out of the "breach" of contract. Therefore, the omission of the phrase "the validity, invalidity, breach, or termination" must have been considered as unnecessary by the parties and not an implicit exclusion of such claims.	1
The result might be different if the parties used the model clause of the Swiss Rules as such and only omitted the word termination (i.e. including "the validity, invalidity or breach") (<i>Bonus</i>)	1
General explanation of separability doctrine: Validity of the AA must be assessed separately from that of the main contract.	1
Art. 178 para. 3 PILA	1
separability doctrine	1

Application of separability doctrine to specific case: Ending main contract w/o effect on the validity of the AA.	1
Conclusion: It is unlikely that the arguments advanced by CC will be upheld and the AT will in all likelihood affirm its jurisdiction.	1
Regular Points	14
Bonus Points	3
Maximum Achievable Score	14

2a) Solution	Pts
A must be independent and impartial	0.5
challenge if circumstances exist that give rise "to legitimate/justifiable doubts" as to independence / impartiality	0.5
Art. 180 para. 1 lit. c PILA	0.5
discussing applicability of Art. 30 para. 1 Cst (<i>Bonus</i>)	0.25
discussing applicability of Art. 6 para. 1 ECHR (<i>Bonus</i>)	0.25
Art. 12 para. 1 Swiss Rules (<i>Bonus</i>)	0.25
This applies to all A, not just the chairperson (<i>Bonus</i>)	0.25
Same standard as to state court judges applies in principle to A but taking into account the peculiarities of international arbitration (<i>Bonus</i>).	0.25
The "independence" requirement can be regarded a matter of objective facts (e.g. subordination, personal and business relationships) whereas the "impartiality" requirement is rather a state of mind which has to be assessed based on objective circumstances as indications (<i>Bonus</i>).	0.5
Duty to disclose the existence of circ. that could give rise to legitimate doubts as to independence/impartiality (Art. 179 para. 6 PILA; Art. 12 para. 2 Swiss Rules) (<i>Bonus</i>).	0.5
IBA Guidelines on Conflicts of Interest in International Arbitration	1
non-binding/not law	0.5
recognized as best practice / valuable working tool	0.5
Circumstances of individual case remain decisive for the assessment of a possible conflict of interest (<i>Bonus</i>).	0.25
IBA Guideline contains prong: Close family relationship with a manager of one of the parties	0.5
IBA Guideline Nr. 2.3.8	1
The term "close family member" includes life partners according to IBA Guideline Nr. 2.2.2 FN 3	0.5
It is a matter contained in the waivable red list.	0.5
These situations are waivable only if and when the parties, being aware of the conflict of interest situation, expressly state their willingness to have such a person act as arbitrator.	0.5
If CC does not agree to this, Ms Waldner cannot be confirmed.	0.5
convincing discussion of IBA Guideline Nr. 2.3.9 (<i>Bonus</i>)	1
CC will in all likelihood not waive this conflict of interest (<i>Bonus</i>)	0.5
IBA Guideline contains prong: A has expressed legal opinion concerning an issue that also arises in the arbitration but opinion is not focused on the case.	0.5
IBA Guideline Nr. 4.1.1	1
It is a matter contained in the green list.	0.5
Green List contains situations where no appearance and no actual conflict of interest exists from an objective point of view. Thus, no duty to disclose.	0.5
No specific confirmation problem with regard to this aspect.	0.5
convincing discussion and negation of IBA Guideline Nr. 3.5.2 (<i>Bonus</i>)	1
Regular Points	10
Bonus Points	5
Maximum Achievable Score	10

2b) Solution	Pts
Sports A has specific features such as closed list of CAS-arbitrators.	0.5
Formal criterion relating to the number of appointments of an arbitrator may be disregarded in certain specific fields such as sports arbitration.	1
IBA Guideline Explanatory Note 5 to Art. 3.1.3	0.5
one cannot generalise and say that this applies to "international arbitration" in general.	0.5

Here IBA Guideline Nr. 3.1.3 applies.	1
IBA Guideline contains prong: A has within, the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties.	0.5
It is a matter contained in the orange list.	0.5
Therefore, this is problematic and Mrs. B's assessment is wrong for the case at hand.	0.5
Situations in orange List may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence. Duty to disclose such situations. In all these situations, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made (<i>Bonus</i>).	0.5
Regular Points	5
Bonus Points	0.5
Maximum Achievable Score	5

3a) Solution	Pts
Option 1: Setting aside the award under Swiss PILA	1
Art. 190 PILA	0.5
if the principle of equal treatment of the parties or the right of the parties to be heard was violated	0.5
Art. 190 para. 2 lit. d PILA	0.5
Appeal to FSC	1
Art. 191 PILA	0.5
within 30 days from the award being communicated (<i>Bonus</i>)	0.25
Art. 190 para. 4 PILA (<i>Bonus</i>)	0.25
PILA 190 contains an exhaustive list of reasons (<i>Bonus</i>)	0.5
An exclusion agreement according to Art. 192 PILA is not possible since BI has seat in CH (<i>Bonus</i>).	0.5
Option 2: Refusal of recognition and enforcement under NYC	1
Art. V NYC	0.5
Applicability of NYC: We have a foreign arbitral award according to Art. I NYC.	0.75
China is a signatory of the NYC (<i>Bonus</i>)	0.5
a) CC was unable to present its case.	0.5
Art. V(1)(b) NYC	0.25
b) arbitral procedure was not in accordance with agreement of parties	0.5
Art. V(1)(d) NYC	0.25
Here, Art. 24 Swiss Rules was potentially violated.	0.25
pertinent discussion of Art. V(2)(b) NYC with regards to procedural public policy (<i>Bonus</i>)	0.5
Regular Points	8
Bonus Points	2.5
Maximum Achievable Score	8

3b) Solution	Pts
The argument that the rules applicable to the arbitration procedure were violated is no ground for setting aside under PILA.	1.5
Recent Decision of the FSC	0.5
Right to be heard, as guaranteed by Art. 190 para. 2 lit. d PILA, corresponds "essentially" to that of Art. 29 para. 2 Cst. (applying to state courts).	0.5
Before state courts there is unconditional right of reply	1
regardless of novelty & relevance of the arguments put forward by opposing party	0.5
Rule cannot be applied "as such" to matters of international arbitration.	1
Here no indications that BI put forward any new arguments that might have surprised CC and justified taking a position.	1
The chance that CC will succeed is very slim.	1
Regular Points	7

4) Solution	Pts
The undefined notion of "investment" in Art. 25 ICSID convention is a <i>ratione materiae</i> /subject matter jurisdictional requirement for ICSID A.	2
Tribunals have developed and largely adhered to the Salini formula/test	1

core elements: contribution of money/assets; a certain duration of performance of the contract; an element of participation in the risk of transaction; a contribution to the host State's development	1
pertinent citation of case law regarding confirmation of Salini formula	1
Last element (contribution to host state's development) has become controversial and has been more or less abandoned in more recent cases.	1
pertinent citation of case law regarding abandonment of last element	1
Furthermore, the prevailing view is that the elements are typical characteristics and not cumulative jurisdictional requirements.	1
pertinent citation of case law regarding nature of the elements as typical characteristics	1
Phoenix presents an alternative, expansive view even integrating two further elements into the inherent notion of investment:	1
1) legality/adherence to the laws of the host state	0.5
2) good faith/bona fide	0.5
This has been critically viewed and many tribunals rather tend to view a legality requirement to be present only where an applicable treaty expressly stipulates the making of an investment in accordance with host state law.	1
Also good faith is generally not considered to form a jurisdictional requirement.	1
pertinent citation of case law regarding the legality and/or good faith requirement	1
Regular Points	12
Bonus Points	2
Maximum Achievable Score	12
Overall Total Points	60