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Spring Semester 2023

International Commercial Arbitration

29 June 2023

Duration: 120 minutes

- Please check at receipt of the exam the number of question sheets. The examination contains 4 pages and 4 questions. It has an enclosure containing 7 pages.

Notes on solving the questions

- Always name the relevant legal provisions and rules!
- The questions should be answered in the given order!
- The exam has an enclosure!

Notes on marking

- When marking the exam each question is weighted separately. Points are distributed to the individual questions as follows:

Question 1	12 points
Question 2	10 points
Question 3	20 points
Question 4	18 points
Total	60 points

Good luck!

Blackout

Urnerpower Ltd. (**Urnerpower**), a globally active energy supplier having its seat in Switzerland, owns a hydropower plant on river Vrbas near Banja Luka, a city in the state of Bosnia and Herzegovina (**BIH**). A concession agreement concluded between Urnerpower and BIH allows Urnerpower to use the water of the Vrbas River to generate electricity under certain conditions (among other things the amount of water used).

The hydropower plant is operated by Banjaturbo Ltd. (**Banjaturbo**), which is seated in Banja Luka and independent from both Urnerpower and BIH. Urnerpower and Banjaturbo concluded a contract (the **Contract**) regarding the operation of the hydropower plant. The Contract contains a liquidated damages clause in favor of Urnerpower in case of violation of the operating conditions, which mirror the terms and conditions of the concession agreement between Urnerpower and BIH.

The Contract does not contain any provisions regarding the settlement of disputes. However, a few days after the Contract was signed, Banjaturbo sent an e-mail to Urnerpower to express its gratitude for the successful negotiations and added:

> "For the sake of clarity, we hereby note, that we have orally agreed that all claims arising out of the Contract shall be adjudicated by a sole arbitrator. The sole arbitrator shall apply the Arbitration Rules of the International Chamber of Commerce (ICC). The seat of the arbitration shall be Zurich (Switzerland). All setting aside proceedings are excluded."

Urnerpower never replied to this e-mail and did not send any other communications to Banjaturbo.

A few weeks ago, BIH realised that Banjaturbo drains too much water from the Vrbas River and therefore violates the terms and conditions of the concession agreement between Urnerpower and BIH. Against this background, BIH fined Urnerpower and threatened to nationalize the hydropower plant if Urnerpower did not ensure that the operating conditions and especially the quantity restrictions would be strictly complied with.

Banjaturbo, whose profits depend on maximizing the output of the power plant, is adamant that it will not lower the current water usage under any circumstances. After heated discussions, Urnerpower sets Banjaturbo a "last deadline" to lower its water usage and to pay liquidated damages as per the Contract. As a response, Banjaturbo commences arbitral proceedings based on the above-cited arbitral clause. In these arbitral proceedings, Banjaturbo argues – by means of a negative declaratory action – that it always complied with the Contract and does not owe any damages to Urnerpower. Urnerpower believes that a state court in BIH would be better suited to deal with the matter and argues in front of the properly appointed sole arbitrator that the arbitration agreement is inoperative because it was not made in writing.

1) **Will the sole arbitrator sustain the jurisdictional objection? (12 Pts)**

Assume, independently from your previous answer, that the sole arbitrator affirms jurisdiction and applies the above-mentioned arbitral clause because Urnerpower filed and substantiated a counterclaim with the sole arbitrator before raising its jurisdictional objection and therefore forfeited its right of objection.

In the meantime, Banjaturbo has further increased its water consumption, resulting in a threat to the stability of the power grid of BIH. Urnerpower, under pressure from the BIH government, hopes for swift injunctive relief because the sole arbitrator is already familiar with the matter. Therefore, Urnerpower urgently requests the sole arbitrator to order Banjaturbo, under the threat of a criminal penalty for non-compliance, to immediately refrain from exceeding the water levels as set out in the Contract.

2) **Please assess if the sole arbitrator has the competence to order injunctive relief and by doing so, would practically solve the problem of Urnerpower! (10 Pts)**

After conclusion of the arbitral proceedings, the sole arbitrator decides to dismiss the negative declaratory action and to order Banjaturbo to pay damages to Urnerpower for breach of contract.

The sole arbitrator finalises and signs the arbitral award in her Spanish law office and transmits it to the parties. Upon receipt of the award, Urnerpower immediately seeks enforcement by initiating attachment and debt enforcement proceedings against the Swiss bank account of Banjaturbo. Banjaturbo has reason to believe that the sole arbitrator ruled beyond the counterclaim that was submitted by Urnerpower. Banjaturbo intends to raise this objection based on Art. V para. 1 lit. c New York Convention in the Swiss debt enforcement proceedings.

3) **Please assess this idea and advise Banjaturbo on this matter! (20 Pts)**

   Note: Do <u>not</u> discuss any national specificities according to Art. 28-29 of the Federal Act on Private International Law as well as the Swiss Debt Enforcement and Bankruptcy Act!

After the enforcement of the arbitral award, Banjaturbo eventually lowers its water usage. However, Banjaturbo does this in such a sudden manner that it causes a blackout in the region of Banja Luka.

With that, BIH has had enough: It decides to expropriate the hydropower plant by means of an emergency ordinance.

Urnerpower does not dispute the legality of the expropriation itself but is of the opinion that the compensation received does not correspond to the fair market value of the hydropower plant. After failed consultations, Urnerpower initiates arbitral proceedings against BIH in front of the International Centre for Settlement of Investment Disputes (ICSID). In these proceedings, BIH argues that the concession agreement between BIH and Urnerpower does not contain an arbitral clause (which is true). The arbitral tribunal shares this opinion and declines its jurisdiction for lack of arbitration agreement. Urnerpower believes that the decision is legally flawed and wants to challenge the award.

4) Please explain how and on what grounds the award can be challenged and assess the chances of success of such a challenge! (18 Pts)

*Note: Switzerland and BIH have ratified the Convention on the Settlement of Investment Disputes between States and Nationals of other States (**ICSID Convention**). Moreover, they have concluded an Agreement on the Promotion and Reciprocal Protection of Investments (**BIT**) of which you will find excerpts in the enclosure to this exam. Assume that it is undisputed that Urnerpower qualifies as an investor and the hydropower plant as an investment within the meaning of the ICSID Convention and the BIT. In addition, for the sake of simplicity, assume that Switzerland and BIH are not parties to the International Energy Charter Treaty.*

ENCLOSURE TO THE EXAM

A g r e e m e n t

between

the Swiss Confederation

and

Bosnia and Herzegovina

on the Promotion and Reciprocal Protection

of Investments

The Swiss Confederation and Bosnia and Herzegovina, hereinafter referred to as "the Contracting Parties",

Desiring to extend and intensify economic co-operation on the basis of equality and to their mutual benefit;

Intending to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party;

Recognising that the promotion and reciprocal protection of such investments under this Agreement will be conducive to the stimulation of business initiative and will increase economic prosperity of the Contracting Parties;

Have agreed as follows:

Article 1

Definitions

For the purposes of this Agreement:

1. The term "investment" means every kind of asset and in particular:

   a) Movable and immovable property as well as any other property rights such as servitudes, mortgages, liens, pledges and usufructs;

   b) Shares, stocks and any other form of participation in companies;

   c) Claims to money or to any performance having an economic value;

   d) Copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), know-how and goodwill;

   e) Business concessions conferred by law or under contract, including concessions to search for, cultivate, extract and exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law.

   Any subsequent change in the form in which assets are invested or reinvested shall not affect their character as investment.

2. The term "investor" means:

   a) In respect of the Swiss Confederation:

      (i) Natural persons who, according to the law of the Swiss Confederation, are considered to be its nationals;

      (ii) Legal entities, including companies, corporations, business associations and other organisations, which are constituted or otherwise duly organised under the law of the Swiss Confederation and have their seat, together with real economic activities, in the territory of the Swiss Confederation;

      (iii) Legal entities not established under the law of the Swiss Confederation but effectively controlled by natural persons as defined in (i) above or by legal entities as defined in (ii) above.

b) In respect of Bosnia and Herzegovina:

(i) Natural persons deriving their status as Bosnia and Herzegovina citizens from the law in force in Bosnia and Herzegovina if they have their permanent residence or main place of business in Bosnia and Herzegovina;

(ii) Legal persons established in accordance with the laws in force in Bosnia and Herzegovina, which have their registered seat, central management or main place of business in the territory of Bosnia and Herzegovina.

3. The term "returns" means the amounts yielded by an investment and in particular, though not exclusively, includes profits, interest, dividends, capital gains, royalties and other fees.

4. The term "territory" means with respect to each Contracting Party the land territory and, where applicable, the internal waters, maritime area and airspace under its sovereignty, including the exclusive economic zone and the continental shelf where the Contracting Party concerned exercises sovereign rights or jurisdiction in conformity with international law.

Article 2

Scope of Application

The present Agreement shall apply to investments in the territory of one Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party, whether prior to or after the entry into force of the Agreement. It shall however not be applicable to claims or disputes arising out of events which occurred prior to its entry into force.

Article 5

Expropriation and Nationalization

1. Neither of the Contracting Parties shall take measures of expropriation, nationalization or any other measures having the same nature or the same effect against investments of investors of the other Contracting Party (hereinafter referred to as "expropriation"), unless the measures are taken in the public interest, on a non-discriminatory basis and under due process of law, and provided that provisions be made for prompt, effective and adequate compensation.

2. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriatory action was taken or became public knowledge in such way as to affect the value of the investment, whichever is earlier. The amount of compensation shall include interest at a normal commercial rate from the date of dispossession until the date of payment, shall be settled in a freely convertible currency, be paid without delay and be freely transferable.

3. The investor affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Contracting Party, of his case and of the valuation of his investment in accordance with the principles set out in this Article.

4. Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which investors of the other Contracting Party own shares, it shall, to the extent necessary and subject to its laws, ensure, that compensation according to this Article will be made available to such investors.

Article 9

Disputes between a Contracting Party and an Investor of the other Contracting Party

1. For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party and without prejudice to Article 10 of this Agreement (Disputes between the Contracting Parties), consultations will take place between the parties concerned.

2. If these consultations do not result in a solution within six months from the date of the written request for consultations, the investor may submit the dispute either to the courts or the administrative tribunals of the Contracting Party in whose territory the investment has been made or to international arbitration. In the latter event the investor has the choice between either of the following:

   a) the International Centre for Settlement of Investment Disputes (ICSID) provided for by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington, on March 18, 1965 (hereinafter the "Convention of Washington"); or

   b) an ad hoc-arbitral tribunal which, unless otherwise agreed upon by the parties to the dispute, shall be established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

3. Each Contracting Party hereby consents to the submission of an investment dispute to international arbitration.

4. A company which has been incorporated or constituted according to the laws in force in the territory of one Contracting Party and which before a dispute arises was under the control of investors of the other Contracting Party shall, in accordance with Article 25 (2) (b) of the Convention of Washington, be treated as a company of the other Contracting Party.

5. The Contracting Party which is party to the dispute shall at no time whatsoever during the process assert as a defence its immunity or the fact that the investor has received or will receive, by virtue of an insurance contract, a compensation covering the whole or part of the incurred damage.

6. Neither Contracting Party shall pursue through diplomatic channels a dispute submitted to international arbitration unless the other Contracting Party does not abide by and comply with the arbitral award.

7. The arbitral award shall be final and binding for the parties to the dispute and shall be executed without delay according to the law of the Contracting Party concerned.

Article 10

Disputes between the Contracting Parties

1. Disputes between the Contracting Parties regarding the interpretation or application of the provisions of this Agreement shall if possible be settled through diplomatic channels.

2. If both Contracting Parties cannot reach an agreement within six months after the beginning of the dispute between themselves, the latter shall, upon request of either Contracting Party, be submitted to an arbitral tribunal of three members. Each Contracting Party shall appoint one arbitrator, and these two arbitrators shall nominate a chairman who shall be a national of a third State.

3. If one of the Contracting Parties has not appointed its arbitrator and has not followed the invitation of the other Contracting Party to make that appointment within two months, the arbitrator shall be appointed upon the request of that Contracting Party by the President of the International Court of Justice.

4. If both arbitrators cannot reach an agreement about the choice of the chairman within two months after their appointment, the latter shall be appointed upon the request of either Contracting Party by the President of the International Court of Justice.

5. If, in the cases specified under paragraphs 3 and 4 of this Article, the President of the International Court of Justice is prevented from carrying out the said function or is a national of either Contracting Party, the appointment shall be made by the Vice-President, and if the latter is prevented or is a national of either Contracting Party, the appointment shall be made by the most senior Judge of the Court who is not a national of either Contracting Party.

6. Subject to other provisions made by the Contracting Parties, the tribunal shall determine its own procedure. Each Contracting Party shall bear the cost of its own member of the tribunal and of its representation in the arbitral proceedings. The cost of the Chairman and the remaining costs shall be borne in equal parts by the Contracting Parties, unless the arbitral tribunal decides otherwise.

7. The decisions of the tribunal are final and binding for each Contracting Party.