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Spring Semester 2023

International Commercial Arbitration

SOLUTIONS

Blackout

Full points were only awarded if the correct answer was given in whole, coherent, and non-contradictory sentences, contained the full citation of all relevant legal provisions as well as rules and included a clear subsumption and conclusion.

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

If an arbitral tribunal has its seat in Switzerland and at least one of the parties did not have its seat in Switzerland, at the time that the arbitration agreement was concluded, the arbitral tribunal will apply the provisions of Chapter 12 of the Swiss PILA (Art. 176 para. 1 PILA) (**2 P**). According to the arbitration agreement referred to by Banjaturbo, the seat of the arbitration shall be Zurich (i.e. Switzerland). Banjaturbo does not have its seat in Switzerland; the conditions of Art. 176 para. 1 PILA are fulfilled, and the sole arbitrator will apply the Swiss PILA (**1 P**).

According to Art. 178 para. 1 PILA the arbitration agreement must be made in writing or any other means of communication allowing it to be evidenced by text (**2 P**). The provision requires the use of text by all parties to the original agreement; the writing requirement is reciprocal (**2 P**). The e-mail of Banjaturbo can be regarded as a means of communication that allows the arbitration agreement to be evidenced by text (**1 P**). However, as it was never replied to by Urnerpower, the reciprocal writing requirement is not fulfilled (**1 P**). According to Art. 186 para. 1 PILA, the arbitral tribunal can decide on its own jurisdiction (principle of competence-competence) (**2 P**). The sole arbitrator will therefore sustain the jurisdictional objection (**1 P**).

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)

Unless the parties have agreed otherwise, an arbitral tribunal may, at the request of a party, order interim measures or conservatory measures (Art. 183 para. 1 PILA) (**2 P**). The ICC rules do not provide otherwise (Art. 28 para. 1 ICC Rules) and there are no other indications that the parties have agreed otherwise (**2 P**). The sole arbitrator can therefore grant injunctive relief (**1 P**).

However, the sole arbitrator does not have the competence regarding coercive measures and cannot order a threat of criminal sanctions (**2 P**). If the party concerned does not comply voluntarily with the measure ordered, the sole arbitrator or a party will have to request the assistance of the competent court (juge d'appui) to order the threat of a criminal penalty for non-compliance (Art. 183 para. 2 PILA), which would probably have to be done in BH to be effective within an acceptable time (**2 P**). According to the facts, Banjaturbo has no intention to lower its water usage; therefore, the order of the sole arbitrator itself, will not practically solve the problem of Urnerpower (**1 P**).

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

The New York Convention only applies to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such an award is sought. It also applies to arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought (Art. I para. 1 NYC) (**2 P**).

According to prevailing jurisprudence and legal doctrine, an award is "made" in the country where the arbitral tribunal is seated (**1 P**). In the case at hand, the sole arbitrator applies the above-mentioned arbitral clause; thus, the seat of the arbitration is Zurich, and the award was made in Switzerland (Art. 176 para. 3 PILA; Art. 18 para. 1 ICC Rules) (**2 P**). The fact that the award was physically finalized and signed in the Spanish law office of the sole arbitrator does not change this result (**1 P**).

Urnerpower seeks enforcement in Switzerland and from a Swiss perspective, the relevant award is considered as domestic (**1 P**). However, according to Art. 192 para. 2 PILA, the New York Convention is applied by analogy to a domestic arbitral award, if the parties have excluded all setting aside proceedings and where the award is to be enforced in Switzerland (**2 P**). According to the e-mail of Banjaturbo, the parties have excluded all setting aside proceedings. However, such an exclusion agreement, is only permissible, if none of the parties has its seat in Switzerland (Art. 192 para. 1 PILA) (**2 P**). Urnerpower has its seat in Switzerland, which is why, such an exclusion agreement would be deemed inadmissible, even if the parties had respected the written form requirement as specified in Art. 178 para. 1 PILA (**2 P**).

As a result, the New York Convention is not applicable (**1 P**). Consequently, Banjaturbo cannot raise its objection in the Swiss debt enforcement proceedings and the idea to do so must be considered as bad (**1 P**).

Instead, Banjaturbo has to raise its objection by means of an appeal to the Swiss Federal Supreme Court (Art. 191 PILA) (**2 P**) on the basis of Art. 190 para 2 lit. c PILA (**1 P**). The appeal must be filed within thirty days from the award being communicated (Art. 190 para. 4 PILA) (**2 P**).

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)

An ICISD award may be challenged by a written application to the Secretary-General requesting an annulment of the award (Art. 52 para. 1 ICSID Convention) (**2 P**). The application shall be made within 120 days after the date on which the award was rendered (Art. 52 para. 2 ICSID Convention) (**2 P**).

There is no specific ground for annulment based on jurisdictional errors, but it is undisputed that an ICSID tribunal commits an excess of powers within the meaning of Art. 52 para. 1 lit. b ICSID Convention not only if it exercises a jurisdiction which it does not have, but also if it fails to exercise a jurisdiction which it possesses under those instruments (Aguas del Aconquija and Vivendi Universal v. Argentine Republic) (**3 P**). The wording of Art. 52 para 1. lit. b ICSID Convention requires a "manifest" excess of powers (**1 P**). However, when it comes to jurisdiction, some tribunals have been less strict because this question is so fundamental; some even argue that the "manifest"-requirement plays no role whatsoever when it comes to reviewing jurisdictional decisions (**1 P**).

Jurisdiction of an ICSID tribunal is decided in accordance with Art. 25 para. 1 ICSID Convention which states that the jurisdiction of the tribunal extends to any legal dispute arising directly out of an investment, between a contracting state and a national of another contracting state, which the parties to the dispute consent in writing to submit to the Centre (**2 P**). In the case at hand, the Agreement between the Swiss Confederation and BIH on the Promotion and Reciprocal Protection of Investments (BIT) applies (**1 P**). According to the dispute settlement mechanism, a dispute between a contracting party and an investor with respects to investments may be submitted to the International Centre for Settlement of Investment Disputes after the failure of consultations (Art. 9 para. 2 lit. a BIT) (**2 P**). Art. 9 para. 3 BIT stipulates that each contracting party (i.e. Switzerland and BIH) "hereby consents to the submission of an investment dispute to international arbitration" (**2 P**). In combination with the written submission of Urnerpower of the dispute to the ICSID, this qualifies as written consent within the meaning of Art. 25 para. 1 ICSID Convention (**1 P**).

The arbitral tribunal has denied its jurisdiction despite this clear and obvious written consent and has therefore manifestly exceeded its powers. Even if one would follow the strict interpretation of Art. 52 para. 1 lit. b ICISD Convention regarding the "manifest"-requirement, the chances that the award will be annulled must therefore be regarded as high (**1 P**).