International Commercial Arbitration (LP) –Allocation of Points

Task 1

	Points	**Points achieved**
Options to constitute the arbitral tribunal		
Applicability of PILA -PILA 176 I: Arbitration with seat in Switzerland (+). Pursuant to old law, it was controversial whether a «seat in Switzerland» is sufficient if the arbitral tribunal cannot be constituted. The legislator has closed the gap in PILA 179 II (see below). Accordingly, «seat in Switzerland» must meet the requirements of PILA 176 I. -At least one party has its domicile/habitual residence/seat not in Switzerland (+). -At the time of the conclusion of the arbitration agreement (+). -No opting out (+).	5 (points for applicability of the PILA are awarded once for the whole exam)	
Option to constitute an arbitral tribunal -If the arbitrators cannot be appointed, the matter may be referred to the state court at the seat of the arbitration. If the parties have merely agreed that the seat of the arbitration shall be Switzerland, the state court first seized shall have jurisdiction (PILA 179 II). -The latter examines by means of a «summary examination» whether an arbitration agreement exists between the parties (see PILA 179 III).	2	
Total Points Task 1	7	

Task 2

	Points	**Points achieved**
Jurisdictional Objections		
a) No valid arbitration agreement **Preliminary Remark** -Any plea of lack of jurisdiction must be raised prior to any defence on the merits (PILA 186 II) (see for further details SFT 4A_98/2017, consid. 2.3) (+). The participation in the constitution of the arbitral tribunal does not constitute a defence on the merits. B timely raised a plea of lack of jurisdiction in its first submission (answer to the request for arbitration).	2	

Form (PILA 178 I) -Valid as to form, if the agreement is evidenced by text (+). Can be in the GT&C (acceptance through GT&C is not a problem of form, but of the consensus).	2	
Substantive Validity (PILA 178 II): Principle of favor validitatis: Alternatively, according to the legal orders as named in PILA 178 II, i.a. according to Swiss law. -Agreement of the parties on essentialia negotii according to Swiss law: exclusion of state courts (1), specification of the object of the dispute or legal relationship, which will be the subject matter of arbitration (2). o In the present case, the arbitration clause foresees the alternative «or state courts». It must be established by way of interpretation who may exercise this right to choose. In case of doubt, it is to be assumed that the claimant has a right to choose. Accordingly, the jurisdiction of the arbitral tribunal is established once it exercises its right (+). o Agreement to submit a specific legal relationship (+). -Consent given based on arbitration clause by reference? Whether the requirement of consent is fulfilled, must be examined according to Swiss substantive law. Particularly, the principle of good faith applies. o Difference between specific reference and general reference. In the present case, general reference. o A general reference to a text containing an arbitration clause is, as a general rule, not sufficient, if the party suggesting the arbitration agreement in this form knows or should have known that the other party would not have wanted to arbitrate at all or only under different conditions. In this context the so-called rule of unusualness needs to be observed according to which a party cannot be expected to have agreed to a clause contained in a text to which the main contract refers if the content of such clause is unusual, i.e., if the content deviates from what a person could reasonably expect. In the present case, both parties are experienced in business. Thus, general reference to arbitration in international commerce (Japan-Germany) is not unusual. Requirement of consent is fulfilled (+).	6	

b) Arbitration Clause null and void? -Pursuant to PILA 178 III, the validity of the arbitration agreement cannot be contested on the grounds that the main contract may not be valid. The provision contains a substantive rule and is also applicable if the substantive validity of the arbitration agreement needs to be determined. The Swiss Federal Tribunal has held that an arbitration clause is valid and binding notwithstanding that the parties had not signed the framework contract, but exchanged markups of the arbitration clause in earlier drafts. -Therefore, B's objection that the QSC was only part of a larger agreement (the DA) and that, if no agreement was reached with regard to a part of this larger agreement, the latter was completely ineffective is not sustainable.	4	
c) Scope of the arbitration agreement -It is questionable whether the arbitration clause in no. 54 GT&C is applicable to claims, which are not based on the QSC but on the DA (which was not concluded at the end). This question concerns the scope of the arbitration agreement. -The law governing the definition of the scope of the arbitration agreement is determined by PILA 178 II. Swiss law is applicable i.a. - According to Swiss law, the scope of the arbitration agreement is to be established by way of interpretation of the arbitration agreement. The latter follows the generally applicable principles of interpretation governing private declarations of intent (see also SFT 4A_342/2019, consid. 3.2): o First of all, the common and actual intent of the parties shall be identified (subjective interpretation). Where no actual intent can be ascertained, the arbitration clause is to be interpreted based on the principle of reliance. I.e., the presumed intent of the parties should be determined, which could and should have been understood by the respective declarants in good faith under the circumstances, including the text and purpose of the clause as well as the events that lead to the conclusion of the contract (objective interpretation). In the present case, objective interpretation applies, as the actual intent is unknown. o In addition, while the court must favour a restrictive interpretation as regards to the question whether there is an intent of the parties to exclude jurisdiction of the state courts, there is no need for a narrow interpretation of the arbitration clause as	8	

regards to its scope once arbitral jurisdiction is established (principle of utility). Therefore, a more liberal, arbitration-friendly approach applies. o In the present case, the circumstances of the case (e.g. the text of the clause) indicate that the claim brought forward by A is covered by the arbitration clause. In addition, the applicable broad interpretation of the latter speaks for the fact that it also covers disputes arising from other contractual documents than the QSC. Hence, A's claim falls under the arbitration clause in no. 54 GT&C.		
d) Qualification of Deadline - It is questionable whether no. 55 of the GT&C is a part of the arbitration agreement, an agreement regarding the arbitral procedure or an agreement on a substantive matter. Different consequences follow from the respective qualification of the clause. o If no. 55 of the GT&C is qualified as a limitation of the arbitration agreement, the jurisdiction of the arbitral tribunal ends after the prescribed period (and state courts would retrieve jurisdiction). o In case of the qualification as procedural clause, A's claim is not admissible (but the arbitral tribunal competent). o If it is qualified as an agreement on a substantive matter, the respective claim for damages must deemed forfeited/time-barred. -It must be determined by way of interpretation what the parties wanted by agreeing on the deadline in no. 55 of the GT&C. In case of doubt, it is to be assumed that the parties did not want to limit the mandate of the arbitral tribunal because consequently, state courts would be competent. In addition, the fact that the limitation is not contained in no. 54 GT&C (the arbitration agreement), but in a separate clause speaks for such interpretation. Therefore, the arbitral tribunal remains competent. -Another argumentation is possible and rewarded with points, if persuasive and well-motivated.	6	
e) Effect of insolvency -On legal capacity: It is questionable which law applies to assess the legal capacity of a party in an international arbitration seated in Switzerland. Hence, it is questionable whether issues of international private law are regulated exclusively in chapter 12 PILA. The correct approach is that the provisions outside chapter 12	5	

PILA in PILA 150 et seq. are applicable. However, the objection in question is not concerned with legal capacity. -On the validity of the arbitration agreement: It is questionable whether the effect of the bankruptcy of one party to an arbitration on an arbitration agreement, as regulated in IA 212, is an issue of legal capacity or an issue of the validity of the arbitration agreement. o If qualified as issue of legal capacity, the conflict-of-laws rule in PILA 150 et seq. apply (see above). o If qualified as issue of the validity of the arbitration agreement, the Swiss lex arbitri, specifically PILA 178 II applies. -The Swiss Federal Tribunal assumes that the qualification is based on Swiss law. According to Swiss law the issue relating to the effects of the bankruptcy of a party to an arbitration / on an arbitration agreement is one of the lex arbitri. Accordingly, PILA 178 II applies and Swiss law is applicable i.a. According to Swiss law, bankruptcy does not affect the validity of an arbitration agreement. Therefore, IA 212 may not deprive the arbitration clause of its validity		
Total Points Task 2	33	

Task 3

	Points	**Points achieved**
Possibility to render preliminary awards? -The possibility of the arbitral tribunal to render a preliminary award is explicitly foreseen in PILA 186 III with regard to the arbitral tribunal's decision on its jurisdiction. -In addition, the arbitral tribunal may render a preliminary award, which does not end the arbitral procedure, on a substantive issue or on other procedural issues (exercising its broad discretion and considering aspects of procedural efficiency).	2	
Possible decisions of the arbitral tribunal -The arbitral tribunal approves objections and declines jurisdiction. -It rejects objections to jurisdiction partially (objections a)-c))	2	

Arbitral tribunal declines jurisdiction/approves objections **Qualification of decision** -Arbitral tribunal renders a final award as proceedings are ended. -The text of PILA 186 III is too broad because it seems to permit the possibility of declining jurisdiction by means of a preliminary decision; In fact, the provision refers only to the situation where an arbitral tribunal assumes jurisdiction by means of a preliminary award (SFT 143 III 462, consid. 3.1). **Possibility to challenge award?** -In the absence of a contrary agreement according to PILA 192, the final award can be challenged on all the grounds listed in PILA 190 II. -Challenge can and must be brought within 30 days since notification of the decision to the parties; If the parties do not bring a challenge within the deadline, they have forfeited their right (SFT 143 III 462, consid. 3.1).	2 3	
Arbitral tribunal rejects objections to jurisdiction partially (interim award on jurisdiction) **Qualification of decision** -According to the SFT, in a preliminary award on jurisdiction, an arbitral tribunal assumes jurisdiction and decides about the issue in a definitive manner (cf. SFT 143 III 462, reason 3.2). Accordingly, a decision, which settles the question of jurisdiction of an international arbitral tribunal only provisionally (interim award on jurisdiction), like in the present case, does not constitute a preliminary award pursuant to PILA 186 III. **Possibility to challenge award?** -While it is possible to challenge a preliminary award on jurisdiction according to PILA 190 III, it is not permissible to appeal an interim award on jurisdiction (SFT 143 III 462, reason 3.2). The **arguments of the SFT** against qualifying an interim award on jurisdiction as preliminary decision are essentially the following: -**Considerations of opportunity**: On one side, there is an interest of the parties and/or the arbitral tribunal to not continue investigating a case, which the appeal body could dispose of indefinitely by accepting the appeal against an interlocutory decision, even if the decision under appeal does not settle the issue of the jurisdiction of the arbitral tribunal definitely. -On the other side, there is an interest of the appeal body (the SFT) not to have to address a case several times as a function of the	2 1 7	

multiple jurisdictional issues that may end up being submitted to the arbitral tribunal successively (procedural economy argument). • Furthermore, there is a risk of abuse as the defending parties could be tempted to practice 'salami slicing' (Salamitaktik) by successively submitting jurisdictional objections before any defense on the merits is brought in order to obtain separate decisions in this respect, only to challenge each decision before the Federal Tribunal. • In addition, there are aspects that may further slow down the appeal proceedings: often request for security for costs and consequently, stay of proceedings (cf. LTF 62 II); often double exchange of briefs as a matter of practice -**Legal grounds**: wording of PILA 190 II let b says that a right to file an appeal exists if "*the arbitral tribunal wrongly accepted or declined jurisdiction".* -An interim award on jurisdiction has more similarities with an interlocutory decision within the meaning of LTF 93 I let b (not with a jurisdictional decision as provided by LTF 92 I). However, the conditions for an appeal against such decision are not applicable in arbitration (see LTF 77 II). -A qualification as interim arbitral award would privilege challenges against interim decisions (based on PILA 190 III) as opposed to federal appeals against interim decisions in civil procedure in front of the Federal Tribunal. This would be contrary to the task entrusted to the latter. -Another argumentation is possible and rewarded with points. See for further details SFT 4A_98/2017.		
Waiver of recourse? The conditions for a waiver according to PILA 192 are: -None of the parties has its domicile, habitual residence, or seat in Switzerland (+); -Agreement on waiver either in the arbitration agreement or in a subsequent agreement (+); -The Agreement shall meet the conditions as to form set out in PILA 178 I. Valid as to form, if the agreement is evidenced by text (+). Consent given to waiver based on arbitration clause by reference? • The new provision no longer requires an "explicit waiver". The consequences are unclear: While it is clear that the parties do not have to explicitly refer to Article 192 PILA, it is questionable whether a waiver by reference is permissible. • In any case, the principle of good faith must be respected.	1 2 2 6	

○ Difference between specific reference and general reference. In the present case, general reference. ○ The rule of unusualness needs to be observed (see above Task 1a)). In the present case, both parties are experienced in business. However, contrary to an arbitration agreement by reference, a waiver by reference is unusual even in international commerce (Japan-Germany). Requirement of consent not fulfilled (-).		
Total Points Task 3	30	
Total Points Exam	70	