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# INTERNATIONAL COMMERCIAL ARBITRATION

2 July 2021

13:00 – 15:00

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## *General notes:*

- Please check at receipt of the exam the number of questions. The examination contains 3 tasks.
- Write your answers directly into the document "Answer\_Module\_xxxxxxxxxxxx" and save it locally on your computer with your Student ID number.
- Write your Student ID number and your Examination serial number in the header on page 2.
- Allowed is a **maximum of 4050 words**. This includes the words of the whole document to be submitted, including the words on the cover sheet, words of the tasks as well as all words of your answer. We will not correct words exceeding the maximum.
- For submission/upload, save the document with your Student ID number as a PDF file according to the example and upload it. Example: Answer\_criminology\_17301002.pdf
- You are responsible for uploading the exam in time. You will not be made aware of this.

## *Notes on solving the questions*

- A complete and successful answer of the questions below includes, inter alia, a correct structure of the answer, statement of the relevant legal provisions, required definitions and particularly, a good argumentation and application of the relevant provisions to the facts of the case.

## *Notes on marking*

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

|              |                      |
|--------------|----------------------|
| Question 1   | 10 % of total points |
| Question 2   | 50 % of total points |
| Question 3   | 40 % of total points |
| <b>Total</b> | <b>100%</b>          |

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We wish you a lot of success!

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**1. Task 1 (10%)**

Company A (seated in Japan) and company B (having its seat in Poland) have concluded a Quality Standard Contract ("QSC"). The Contract regulates, in particular, the quality standards A needs to observe when providing goods and services to B. The QSC refers in clause 6 to the general terms and conditions ("GT&C") of A. These GT&C contain the following provision in clause 54:

*"Contract disputes shall be settled by an arbitral tribunal consisting of three arbitrators or by state courts. The language of the arbitration is English and the seat of the arbitration is Switzerland. The award is final and binding and the parties waive the possibility of appeal to the Swiss Federal Tribunal."*

A has initiated arbitration proceedings against B. In its request for arbitration, A has nominated "its" arbitrator. Thereupon, B has nominated "its" arbitrator. The two party-appointed arbitrators cannot agree on a chairperson.

*What options does A have in order to constitute the arbitral tribunal? As for the Swiss Private International Law Act ("PILA"), please apply the version in force on 1 February 2021.*

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**2. Task 2 (50%)**

Once the arbitral tribunal has been constituted, the arbitral tribunal invites B to file an answer to A's request for arbitration. In its answer, B objects to the jurisdiction of the arbitral tribunal and submits as follows:

- a) There is no valid arbitration agreement. It is true that the parties have concluded the QSC. However, B submits that even though it is a global player in the market, it was not aware of the arbitration clause in the GT&C when it agreed to the QSC; one reason being that in Japan arbitration is less common than in other parts of the world. In addition, the GT&C were not attached to A's contract offer at the time. Therefore, B submits, it was taken by "complete surprise" when realizing at a later point in time that the GT&C included an arbitration clause. B further argues that it could not be reasonably expected to have looked up and downloaded the GT&C from A's website, and that A should have provided it with a copy at the time of the execution of the QSC.
- b) B further submits that the above arbitration clause (no. 54 GT&C) is null and void because the QSC is only a part of a larger agreement the parties intended to execute. B explains that alongside the QSC the parties meant to also conclude a distribution agreement ("DA"). The latter regulated – inter alia – B's rights and obligations when distributing the goods and services provided by A. Neither the QSC nor the DA were meant to be standalone agreements. The parties exchanged various drafts of the DA, none of which contained an arbitration clause. In the end, the execution of the DA failed because the parties could not agree on some minor details. B submits that because the DA was never executed, the QSC (and, therefore, also the arbitration clause included by reference to the GT&C) must be deemed invalid as well.

- c) Furthermore, according to B, the claim filed by A is not covered by the arbitration clause. B submits that once the execution of the DA failed, it terminated the legal relationship and the negotiations with A and told A in clear terms that it was no longer interested in distributing A's goods and services. It was at this point that A filed its claim for damages against B before the arbitral tribunal. A argues that it is entitled to damages because B unjustifiably broke off the contract negotiations and failed to distribute its goods and services. B submits that A's claim is not covered by the arbitration clause contained in no. 54 GT&C because it bears no relation to the QSC.
- d) In addition, B points to no. 55 of the GT&C. The provision reads as follows:  
*"Any claim of the parties must be filed with the competent adjudicatory authority according to no. 54 GT&C within 6 months after the dispute has arisen."*  
B submits that A has disregarded this deadline, since the dispute arose one year before A filed the request for arbitration. Thus, the arbitration agreement has lapsed.
- e) Finally, B submits that it is no longer bound by the arbitration agreement because, once the arbitration proceedings commenced, the competent Polish court opened insolvency proceedings over its estate. Polish insolvency law provides that, in case insolvency proceedings are opened over a debtor's estate, an arbitration agreement entered into by the debtor prior to the opening of the insolvency proceedings becomes null and void (212 Insolvency Act – "IA").

*Please address all of the above jurisdictional objections and judge their prospects of success by evaluating all relevant issues. As for the Swiss Private International Law Act ("PILA"), please apply the version in force on 1 February 2021.*

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### 3. Task 3 (40%)

The arbitral tribunal – after granting the parties the right to be heard – decides to address the above objections to jurisdiction a) to c) – **but not d) and e)** – as a threshold matter in a separate decision.

*Please explain, considering all relevant arguments, if and to what extent the decision of the arbitral tribunal may be appealed to the Swiss Federal Tribunal. Please answer the question in the abstract, considering the different possible conclusions of the arbitral tribunal, without reference to your solutions found under question 1. As for the Swiss Private International Law Act ("PILA"), please apply the version in force on 1 February 2021.*

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