

International Commercial Arbitration (Legal Practice)

A professional athlete (A) residing in France, has entered into an Employment Agreement (hereinafter referred to as the "Agreement") with the German basketball club B (domiciled in Berlin). The Agreement, signed by both parties, contains – inter alia – the following clause:

"... clause 10: The Agreement is governed by German law. In addition, the parties submit to the Rules and Regulations of the International Basketball Federation FIBA (domiciled in Switzerland)."

The Rules and Regulations of FIBA (Article 5) read as follows:

"Any dispute arising from or related to contracts between players and clubs shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a panel of three arbitrators. The seat of the arbitration shall be Geneva, Switzerland. Any appeal against the award issued by the BAT before the Swiss tribunals is herewith expressly excluded."

Subsequently, due to B's failure to make timely salary payments, a dispute has arisen between A and B. The parties resolve their dispute by concluding a Settlement Agreement, which, inter alia, reads as follows:

"As per the date of this Settlement Agreement, all claims arising out of the Parties' previous agreements shall be waived and all previous agreements shall be deemed null and void. B undertakes to pay to A, at the latest by 12 October 2015, a lump sum of EUR 120,000. A shall not be under any further obligation to B, and shall be free to contract and play with any other club of his choice."

However, B again fails to pay by the agreed date. As a result, A – out of frustration – assigns the receivables due under the Settlement Agreement to his agent (C), residing in Switzerland. Meanwhile, B has filed a negative declaratory action against A in Berlin, requesting the court to declare that B does not owe any money to A.

Shortly afterwards, C commences arbitration proceedings against B before the BAT. In his Request for Arbitration C claims the entitlement according to the Settlement Agreement, amounting to EUR 120,000. B objects to the competence of the BAT, arguing that

- a lawsuit concerning the entitlement is pending before a German court;
- the Agreement is null and void pursuant to German law;
- A and B did not agree on an arbitration clause in their Settlement Agreement;
- at any rate, C is not a party to any allegedly existing arbitration clause;
- employment disputes are not arbitrable under German law.
- In event: i.e., should the BAT accept jurisdiction, B declares to set off C's claims with a claim for damages, based on the allegation that C severely damaged a vehicle owned by the club.

Question 1: How will the Arbitral Tribunal proceed, and what will be its decision? (50%)

While the arbitral proceedings are underway, B goes bankrupt and, consequently, bankruptcy proceedings are instituted against its assets. B now claims that – in accordance with German law – arbitration agreements become invalid once bankruptcy proceedings are pending against one of the parties, because the insolvent party lacks subjective arbitrability.

Question 2: How does the institution of bankruptcy proceedings affect the validity of the arbitration agreement? (20%)

In the Arbitral Tribunal's Final Award, C is awarded EUR 120,000. One week after receiving the Arbitral Award, B learns that the spouse of the arbitrator nominated by C is a partner in the law firm of the attorney who represented C in the proceedings before the BAT.

Question 3: What can B do? (30%)

Exam Date	21.06.2016		
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Question 1	Comments	Points	Pts. Achieved
Jurisdictional analysis		6	
<p>Applicable legal framework: Domestic/international</p> <p>When does Chapter 12 apply? Art 176 (1) PILA</p> <ul style="list-style-type: none"> - seat of tribunal - domicile of at least one party not in CH - no Art 176 (2) PILA exclusion <p>Competence-competence: tribunal itself shall decide on jurisdictional matters</p> <ul style="list-style-type: none"> - Art. 186 PILA <p>Options of tribunal re jurisdiction: Art 186 (3) PILA</p> <ul style="list-style-type: none"> - preliminary decision by the tribunal - purpose: to clarify jurisdiction as soon as possible <p>Or: in final award</p> <p>Art 190 (3) PILA: - challenge of preliminary award; otherwise this constitutes a waiver</p>		<p>0.5</p> <p>0.5</p> <p>0.5</p> <p>0.5</p> <p>0.5</p> <p>0.5</p> <p>1</p> <p>1</p> <p>1</p>	
a) Lis pendens		5	
<p>Definition lis pendens; risk of parallel proceedings and contradicting decisions</p> <p>ECJ: same dispute?</p>		<p>1</p> <p>1</p>	

<p>Analysis of Art 186 (1bis) PILA: no general lis pendens-rule - „noteworthy grounds“- exception - examples for circumstances to take into account</p> <p>Art II NYC: courts shall refer parties to arbitration</p>		<p>1 1 0.5 0.5</p>	
<p>b) Agreement invalid? Validity of arbitration clause?</p>		<p>8</p>	
<p>Separability doctrine - Art 178 (3) PILA - Definition</p> <p>Essentialia negotii = intent to arbitrate / arbitral tribunal / dispute</p> <p>Art 178 (2) PILA: law applicable to the arbitration agreement: - either law applicable to main contract, law chosen by the parties (x), or Swiss law</p> <p>in casu problematic: intent to arbitrate: - Interpretation of intent to arbitrate under Swiss law: - Problem: arbitration agreement per specific / general reference - here general reference - valid? principle of unusualness: specific circumstances, respective industry, principle of good faith.</p> <p>Art 178 (1) PILA: formal validity; writing requirement (+)</p>		<p>1 1.5 0.5 0.5 0.5 1 1 1 1 1</p>	
<p>c) Scope of the arb.clause (settlement agreement)</p>		<p>1.5</p>	
<p>Interpretation of clause – applicable law: Art 178 (2) PILA</p>		<p>0.5</p>	

<p>If CH-law applicable: broad scope of clause: settlement agreement might be covered by arbitration clause, if the two contracts are interlinked. In casu: +</p>		<p>0.5</p> <p>0.5</p>	
<p>d) Parties to the agreement</p>		<p>1.5</p>	
<p>Extension to third parties: assignment of the claim (singular succession)</p> <p>Writing requirement: fulfilled for A and B, but not for C; - however: predominant view, that C would also be bound by the agreement</p>		<p>1</p> <p>0.5</p>	
<p>e) Objective arbitrability of employment contracts</p>		<p>1</p>	
<p>Art 177 (1) PILA - all disputes regarding economic interests are arbitrable</p>		<p>0.5</p> <p>0.5</p>	
<p>f) Compensation/counterclaim</p>		<p>2</p>	
<p>How to treat compensation procedurally? - as counterclaim? - CH : “Juge de l’action est le juge de l’exception“</p>		<p>1</p> <p>1</p>	
<p>Total Question 1 (50%)</p>		<p>25</p>	

Question 2	Comments	Points	Pts. achieved
Bankruptcy and arbitration		8.5	
<p>Question of legal capacity of a party?</p> <p>applicable law generally – domicile/incorporation</p> <p>Case law SFT: Vivendi (Polish law) 2nd case re Portuguese law</p> <p>In CH: Effect of bankruptcy on arbitration agreement to be analyzed according to Art. 178 (2) PILA – substantive validity; in favorem validitatis</p> <p>➤ AA stays valid</p> <p>possible stay of proceedings (right to be heard) - in order to give liquidator time to prepare</p>		<p>1</p> <p>1</p> <p>1</p> <p>1</p> <p>1</p> <p>1</p> <p>1</p> <p>1</p> <p>0.5</p>	
Total Question 2 (20%)		8.5	

Question 3	Comments	Points	Pts achieved
Independence/Impartiality		12.5	
<p>Definition Impartiality Definition Independence</p> <p>Art 180 (1) c PILA - “justifiable doubts” as to his or her independence - mandatory provision/Swiss constitution</p> <p>Art 180 (2) PILA: challenge the arbitrator; - notification without delay - principle of good faith</p> <p>- Arbitral proceedings may continue in the meantime, Art 13 (3) UNCITRAL Model Law</p> <p>- Art 180 (3) PILA: party autonomy; subsidiary support of juge d’appui</p> <p>- Duty of disclosure</p> <p>IBA Guidelines on Conflicts of Interest - Not binding - Explanation of its structure - Which ground is specifically relevant?</p>		<p>0.5 0.5</p> <p>1 1 1</p> <p>1 0.5 0.5</p> <p>1 0.5</p> <p>1 0.5</p> <p>1 0.5 0.5 0.5</p>	
Access to state court?		4	
<p>Action for annulment - Art 190 (2) lit. a PILA Valid waiver? - Art. 192 PILA: parties not domiciled in CH Express provision missing - Reference (x)</p>		<p>1 1 1 1</p>	
Total Question 3 (30%)		16.5	
Total Exam (100%)		50	