



Prof. Dr. Lorenz Droese

Spring Semester 2022

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## International Commercial Arbitration

### 22 June 2022

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**Duration:** 120 minutes

- Please check at receipt of the exam the number of question sheets. The examination contains 4 pages and 4 questions.

#### Notes on solving the questions

- Always name the relevant legal provisions!

#### Notes on marking

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

##### Part A

Question 1	18 points	30 %
Question 2	15 points	25 %
Question 3	15 points	25 %

##### Part B

Question 4	12 points	20 %
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<b>Total</b>	<b>60 points</b>	<b>100 %</b>
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**We wish you a lot of success!**

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**Part A**

Bonderer Informatics vs. Chinese Chips

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**Question 1 (18 Points)**

You are a lawyer in the arbitration department of an international law firm. You receive an email from a colleague, referring a longstanding client, Mr. Bonderer, to you with an urgent request. Mr. Bonderer is the sole shareholder and director of Bonderer Informatics AG (BI), which has its seat in Switzerland. Some time ago, BI has entered into a delivery contract (Contract) with a Chinese company, Chinese Chips Inc. (CC), regarding annual deliveries of computer chips. In December 2021, CC terminated the Contract because of increasing market prices and alleged interruptions in the supply chain. BI disputes that CC is entitled to terminate the Contract and claims damages from CC.

The Contract contains the following clause:

*"Any dispute, controversy, or claim arising out of, or in relation to this contract shall be resolved by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Arbitration Centre in force on the date on which the Notice of Arbitration is submitted in accordance with those Rules. The number of arbitrators shall be three. The seat of the arbitration shall be Zurich, Switzerland. The arbitral proceedings shall be conducted in English."*

In a heated exchange of emails with CC, BI set a "last deadline" for payment and threatened that it would otherwise initiate arbitral proceedings. As a response, CC filed a negative declaratory action with the Chinese state courts claiming that an arbitral tribunal would not have jurisdiction and that CC was entitled to terminate the contract. Mr. Bonderer provided you with a translated copy of the submission which CC filed with the Chinese courts. As to jurisdiction, CC states as follows:

- *"The arbitration clause in the Contract does nearly, but not exactly correspond to the model clause of the Swiss Rules of International Arbitration (cf. Swiss Rules, p.4). In contrast to the clause in the Contract, the model clause explicitly mentions that the arbitration agreement shall also cover "the validity, invalidity, breach, or termination" of the contract (Swiss Rules, p. 4). By the slight adaption of the model clause, i.e. by omitting the word "termination", the parties intentionally excluded the arbitral tribunals' jurisdiction in this regard."*
- *"In any case, CC has terminated the arbitration agreement by terminating the Contract in December 2021 and thus withdrawn its consent to arbitrate."*

Mr. Bonderer is concerned that the Chinese proceedings will delay the resolution of the dispute as he has once heard that the principle of *lis pendens* blocks all other courts once proceedings have started. As for the question whether the termination of the Contract is excluded, it always seemed perfectly clear to him that all claims regarding the Contract, including its termination, should fall under the arbitral clause. In his recollection, an exclusion of certain claims was not discussed nor was the word "termination" omitted intentionally.



- a) Please comment on Mr. Bonderer's concerns regarding the principle of *lis pendens*! (4 Pts)
- b) Alternative: If CC had not initiated proceedings in front of the Chinese state courts but raised its jurisdictional objections as a defense in the arbitral proceedings instead. How would you assess the chances that the arbitral tribunal would uphold them and deny its jurisdiction? (Assume that the Swiss Rules 2021 were already in force, when the Contract was concluded.) (14 Pts)
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### Question 2 (15 Pts)

Mr. Bonderer has mandated you as his counsel and wants to appoint Ms. Waldner as BI's party-appointed arbitrator. Mr. Bonderer believes that Ms. Waldner, who works in an arbitration boutique in Zurich, would be a perfect fit since (i) Ms. Waldner's life partner is the chief executive officer of BI and (ii) because Ms. Waldner has repeatedly published strong opinions on legal questions that seem to favor BI's position in the case at hand.

- a) Can Ms. Waldner be confirmed as party-appointed arbitrator? (10 Pts)

Ms. Waldner has – within the last three years – twice acted as wing-arbitrator for BI in arbitral proceedings totally independent from the present case. Mr. Bonderer considered this as irrelevant and failed to mention it because his wife, Mrs. Bonderer, who works in the legal department of the International Federation of Association Football (FIFA), told him that she never had any problems in this regard and that such circumstances would be completely unproblematic in international arbitration.

- b) Do you share Mrs. Bonderer's assessment? (5 Pts)
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### Question 3 (15 Pts)

Eventually, the arbitral tribunal was successfully (and to the satisfaction of both parties) constituted. After conclusion of the hearings, the tribunal asked the parties to simultaneously make post-hearing submissions – which were not contained in the agreed upon procedural timetable. CC did not want that BI would be given another opportunity to strengthen its case. On this basis, CC duly objected and claimed violation of Art. 24 Swiss Rules which stipulates that the arbitral tribunal shall consult with the parties before ordering additional written submissions. The tribunal, however, dismissed CC's objection and reiterated its request.

After all, both parties submitted post-hearing submissions. In BI's two-paged submission, you briefly summarised the main arguments which BI brought forward in the arbitral proceedings. Upon receipt of your post-hearing submission, CC immediately informed the arbitral tribunal that it intends to file an additional submission to contradict BI's post-hearing submission. The arbitral tribunal, however, refused to accept any additional submissions and rendered its award instead – ordering CC to pay USD 2'702'199.40 plus interest to BI.



CC believes that its rights have been infringed upon and does not want to comply with the award.

- a) What legal options does CC have? (CC has only assets in China. Do not discuss any options under national debt enforcement law or questions of lis pendens!) (8 Pts)
- b) Mr. Bonderer is worried that the award could be successfully set aside and asks for your opinion on this matter. How do you assess the chances that CC will succeed? (7 Pts)

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**Part B**  
Phoenix

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**Question 4 (12 Pts)**

The well-known award in Phoenix v. Czech Republic, ICSID Case No. ARB/06/5, 15 April 2009, stated in para 114:

*“To summarize all the requirements for an investment to benefit from the international protection of ICSID, the Tribunal considers that the following six elements have to be taken into account:*

- 1. a contribution in money or other assets;*
- 2. a certain duration;*
- 3. an element of risk;*
- 4. an operation made in order to develop an economic activity in the host State;*
- 5. assets invested in accordance with the laws of the host State;*
- 6. assets invested bona fide.”*

Article 25 para. 1 of the ICSID Convention reads as follows:

*“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”*

Please explain the relevance of the notion of "investment" for purposes of ICSID arbitration and to what extent the view of the Phoenix tribunal is still shared by investment jurisprudence in this regard!