

Point allocation FS 2019
International Commercial Arbitration (Legal Practice)

	Points	Points achieved	Comments
Question 1			
a) Applicability of the PILA, in case B intends to initiate arbitral proceedings against A?			
Chapter 12 PILA: Art 176 (1) PILA	1		
i. seat of tribunal in CH?	0.5		
*can be determined by the parties	0.5		
*"seat" means, in principle, place, not a country	0.5		
> here: "seat in Switzerland" > no specific seat chosen	0.5		
*majority view: could lead to the invalidity of the AA	0.5		
(see Poudret/Besson, n. 139)			
*Interpretation of this wording?	0.5		
(according to the interpretation of contracts)			
*Art. 355 (2) CCP per analogiam? (disputed)	0.5		
*Art. 176 (3) PILA: seat can be determined	1		
by the tribunal or the institution			
> in casu: no institutional arbitration,	0.5		
and no arbitral proceedings initiated			
> arbitrators must be appointed,	0.5		
or at least Canton/juge d'appui specified (Art. 179 PILA)			
ii. domicile of at least one party not in CH?	0.5		
*when? > at the time of the conclusion of the AA	1		
*Parties to the contract or parties to the proceedings?	0.5		
> according to the SFT (see 4P.54/2002, E.3.),	0.5		
the parties to the proceedings matter, and not			
the parties to the contract (disputed)			
> both A and B (the parties to the proceedings)	0.5		
have their seat in CH			
Result: <u>PILA is not applicable</u> (view of the SFT)	0.5		
iii. no exclusion (Art 176 (2) PILA)?	0.5		
in casu not pertinent			
b) Applicability of the PILA, if C has assigned its rights out of the contract to D, and D initiates arbitration against A?			
Chapter 12 PILA: Art 176 (1) PILA	1		
i. seat of tribunal in CH	0.5		
as above			
ii. domicile of at least one party not in CH	0.5		
*assignment has no influence, relevant is C	0.5		
> C had its domicile abroad	0.5		
> at the time the AA was concluded	0.5		
iii. no exclusion (Art 176 (2) PILA)	0.5		
in casu not pertinent			
Result: <u>PILA is applicable</u>	0.5		
Total Q1:	15		

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Question 2	Points	Points achieved	Comments
i. applicability of the NYC			
*Art. 194 PILA refers to the NYC	1		
*Art. I (1) NYC: "foreign arbitral award"	1		
refers to the arbitral seat	1		
in CH: territorial principle	1		
CH: neither reciprocity nor commercial reservation	1		
Result: <u>NYC is applicable</u>	1		
ii. "sufficient connection-requirement"			
> comes into play if a creditor wishes to attach assets	1		
of a foreign state located in CH			
> only in cases in which foreign state acted as holder	1		
of private rights ("iure gestionis")			
> circumstances present that tie the legal relationship	1		
closely to CH			
> mere location of assets in CH is not sufficient	1		
iii. effects of missing connection			
> procedural prerequisite missing (admissibility)	1		
> request is inadmissible (procedural decision)	1		
iv. breach of obligations under the NYC (Art. III)?			
> in principle, Art. V NYC governs R&E of awards	1		
yet, they must be procedurally admissible (Art. III NYC)	1		
Result: <u>no breach of the NYC</u>	1		
Total Q2:	15		

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Question 3	Points	Points achieved	Comments
i. Applicability of Art. 176 PILA	1		
> at least one party domiciled abroad	1		
> seat of arbitration in CH	1		
> no opt-out according to Art. 176 (2) PILA	1		
Result: <u>PILA is applicable</u>	1		
ii. Separability doctrine	1		
> main contract has not been validly concluded	1		
> Art. 178 (3) PILA	1		
Result: <u>arbitration clause is not a priori invalid</u>	1		
iii. Substantive validity of the agreement			
*Art. 178 (2) applicable law: in casu Swiss law	1		
> in favorem validitatis	1		
*essentialia negotii			
(1) agreement by the parties to submit their dispute to arbitration;	1		
(2) specification of the object of the dispute/legal relationship (> subject-matter of the dispute)	1		
> mutual expression of intent re essentialia negotii	1		
(Arts. 1-2 CO)			
*interpretation: arbitration clause's binding effect	1		
real and common will of the parties (Art. 18 (1) CO)?	1		
in casu: subjective will of the parties unclear, thus objective interpretation must be conducted:	1		
> principle of good faith, reliance	1		
> circumstances accompanying the AA?	1		
extensive negotiations, financial investments made			
Result: <u>circumstances suggest a binding effect</u>	1		
iv. Formal validity of the agreement			
*Art. 178 (1) PILA	1		
writing requirement	1		
> does not require the signature of a party as long as written declarations of will can clearly be attributed to the parties	1		
Result: <u>writing requirement of Art. 178 (1) PILA is met</u>	1		
*Does the signature-requirement in the main contract also apply to the arbitration clause?	1		
> wording of the signature-requirement suggests so	1		
> are stricter requirements than Art. 178 (1) PILA even permitted? (disputed) both points of view are possible	1		
v. competence-competence of the tribunal			
*Art. 186 (1) PILA: competence-competence	1		
*Art. 186 (3) PILA: preliminary award on jurisdiction	1		
or: final award	1		
Total Q3:	30		
Total Q1+Q2+Q3:	60		
Points reached:	0		

Examination no.