

NOVA UNIVERSITY
INTERNATIONAL COMMERCIAL ARBITRATION
EXAM
21/6/19

Part 1: a number of definitions that ask for short answers, with a pre-defined maximum number of lines to be written in each one of the answers by the student (4/20 points).
Use no more than 5 lines for each answer

1. Please explain the meaning of "*favor arbitratis*" when courts of law analyse an arbitral award under a request for its set aside.
2. Please clarify the distinction between "international public policy" and "national public policy", in accordance with the Portuguese Arbitration Law (PAL) as a limit to the discretion of the arbitral tribunal to apply the law as it seems fit.
3. Explain the meaning of the "neutrality" rule, as referred at article 10(6) of the PAL.
4. What is an "*ex parte*" interim measure tribunal decision?

Part 2: a text about arbitration in which a number of statements are not correct. You are expected to simply highlight which of them you consider are not correct. No comments are required or even expected (4/20). **Suggested answer will just "correct" or "wrong"**

- (i) Arbitration is about fairness and arbitrators, being different of judges, must look the facts without paying too much attention to the applicable law.
- (ii) The Brazilian company X started an arbitration process against the Portuguese company Z. The grounds for the request were baically that X signed a contract with the Italian company Y, which has a 45% share in Z, and the assets that might be seized are in Z.
- (iii) Y answered to the request stating that it did not participate in the negotiation of the contract, does not control Z and the object of the contract is not related with it.

- (iv) As a consequence, Y requested the ICC (the arbitration centre referred in the arbitral clause to administer the case) to dismiss the case immediately.
- (v) X answered to the request stating that it is for the Arbitral Tribunal to decide and that it wishes to provide witnesses statements to establish its case related to the responsibility of Y for the breaches as grounds to consider that Y shall be the respondent in the arbitration.
- (vi) The Tribunal decided without any instruction of the case (notably did not hear the witnesses) against its own jurisdiction, as the contract was not signed by Y.
- (vii) X requested ICC to annul the award, as the seat of the arbitration is Wildlandia and the local courts might rule in favour of the interest of Italian company Y, and as arbitration is international by nature the ICC Court is better suited to annul the award
- (viii) The ICC decided not to analyse the request.

Part 3: it is assumed that you have been chosen as counsel for an international arbitration. Your client provides you with some information (the "memorandum") about the case (you will receive that information). You must analyse it carefully and revert to your client with a short risk assessment and with questions about usual relevant issues if not provided by the client. You will be requested not to write more than a suggested number of lines (7/20). **Suggestion is less to write than 70 lines**

MEMORANDUM FROM MR BULLDOG TO OUTSIDE COUNSEL

I have been surprised by an unbelievable letter that – even without being an expert on criminal law – I am sure that it would justify to send the CEO of Now the Enemy, SA (from now on "NE"), a Portuguese company, directly to jail!

We are sure that we did nothing (as you know we are an English company, and our name is "we are the best, Inc", from now on "TB", meaning The Best) that might justify so outrageously letter.

However, as I am always playing in the safe side, we need urgently from you a risk assessment. I assume that all the information you need for your legal

opinion is referred below, but feel free to make questions that I will answer immediately.

Please don't act as usually you lawyers do: not focusing on the issues, questions instead of answers, a lot of bullshit, no real risk assessment and, in the end of the day, I will be more confused than before. As I want this to be confidential, use my personal mail (humanbulldog@wearethebest.com).

The facts are simple:

I met some years ago with NE's CEO and we drafted and signed a very short text that he insisted to be called "Agreement" (that was ok with, as without the word "Contract" I am sure that the document has no validity). The text was not reviewed by lawyers. The text just stated that we would set up a joint venture for investing on a mining concession in "Corruptlandia" and decided how to proceed.

You know that country: without paying huge amounts of money to connected people, nothing is possible. I am clever: you would never see the word "corruption" in the agreement, but I know that you need to understand also the hidden aspects.

In the agreement, and based on a NE suggestion, it was stated that we should hire the then Prime-Minister son (from now on "the boy") to coordinate some activities to be defined, with a monthly instalment of 10.000 USD, plus 1 million USD if and after the concession of the uranium mine in Farwest has been granted for 50 years under conditions acceptable for us.

Months later, and now by a Contract negotiated by lawyers, a joint venture has been set up in Corruptlandia, through a limited company (JV) in which TB would have 60% of the shares, the others being for NE. The JV Board of Directors is nominated by TB, under a shareholders agreement with an ICC arbitral clause, the applicable law is Portuguese and the seat for the arbitration is Paris.

The boy is smart and within less than 6 month the JV signed the Concession Agreement under very, very good conditions. As agreed, it was TB who advanced the monies to the JV for all the expenses, including payments to the boy.

The mining started with great success and less than 1 year after the signature of the concession agreement, JV had more than 10 million USD in cash after all the expenses being paid.

Surprisingly, some militaries seized the power and informed the JV that the new government would cancel the concession, unless within the next 90 days, 49% of JV capital is sold for 1 USD to the State and 5 million USD paid to some off shore companies nominated by the new President.

NE refused to accept this request, stating that it was unacceptable to pay bribes, did not agree to have its 40% stake diluted and asked TB to start arbitration against Corruptlandia under an investment treaty (BIT) between Portugal and this country (only with Portugal, for unknown reasons, Corruptlandia has a valid and binding BIT).

The JV, nevertheless, had no other choice than to accept the conditions of the new rulers; it would be a mistake to start arbitration – even if possible - against the country or to resort to the local judiciary as it would be just a waste of time and money. NE and TB have been previously informed by the BoD of the JV of the decision to surrender to the local authorities, informed, NE did not answer to the JV letter, asked for a general meeting of shareholders or proposed the dismissal of the board members. Accordingly, JV acted before the 90 days deadline.

Now, by the attached letter from NE, they inform us they will resort to ICC arbitration, in Lisbon, requesting the arbitral tribunal to declare the termination of the Shareholders Agreement, the payment by TB of 5 million USD and an order to TB to buy the remaining shares owned by NE in the JV for a value equivalent to the discounted value of 40% of the stock capital calculated for the remaining 48 years of the Farwest mine concession, all with interest accrued.

Part 4: For this same case, as detailed by the “memorandum”, you are now the Sole Arbitrator and you will be confronted with some issues to be dealt in the award. You will be asked not to write more than a suggested number of lines (5/20). **Suggestion of less than 5 lines for each answer.**

The questions to be decided by you, as arbitrator, are the following:

- a) Where should be the seat of arbitration?
- b) The JV must be a party to the arbitration?

- c) Was it possible for any of the parties to start investment protection arbitration against Corruptlandia?
- d) The Agreement and/or the Contract are valid legal instruments between the parties?
- e) Assuming that the facts, as described by Human Bulldog, have been evidenced, are there any issues of public policy that might make the Agreement and/or the Contract null and void?
- f) What are the consequences, if any, of public policy violation in relation to the relief requested by NE against TB?