

EXAM ID NO: _____

CHAPMAN UNIVERSITY
DALE E. FOWLER SCHOOL OF LAW

INTERNATIONAL COMMERCIAL ARBITRATION
PROFESSOR AARON GHIRARDELLI

Fall 2014 Exam

Take Home Exam, December 2nd 2014

Exam Answers are due by 5:00 PM on December 4th 2014

PLEASE READ THIS INFORMATION SHEET CAREFULLY TO UNDERSTAND HOW TO TAKE THIS EXAM. THANK YOU.

1. Answer this exam anonymously. Write the exam ID that you have been assigned (**NOT** your student ID number) in the space provided above and also on each of your blue books (if you are handwriting your answers) or at the top of each page of your typewritten answers.

Never use your name or any identifier other than your exam ID on your exam.

2. The examination is a take-home exam containing 10 short answer questions and 1 essay on the material covered during the course. This examination counts for 85% of your final grade. This is an open book exam, meaning that students are authorized to use the course's casebook and their notes to answer the questions. Use cases, arguments and discussions covered during classes to properly draft your answers. You can write your answers right after each question and after the essay fact pattern and you can use as much space as you need. **While there is no minimum length requirement for each answer and essay, it is expected that students will take the opportunity to present properly articulated answers, providing the instructor with a clear legal reasoning and explanation.**
3. The exam is distributed by the registrar office and it is available on December 2nd 2014, from 10:00 AM. **Students will have to bring back the exam answers to the registrar office no later than December 4th 2014, 5:00 PM.**
4. **You must not discuss the exam questions or any possible answer with anyone until all exams have been completed and grades submitted at the end of the finals period.**
5. The exam for International Commercial Arbitration starts on the next page. This exam book consists of 5 pages (*including this page*).

**THE LAW SCHOOL CODE OF STUDENT CONDUCT & DISCIPLINARY
PROCEDURES APPLIES TO THIS EXAMINATION.**

SHORT ANSWER QUESTIONS

Question 1

Describe the main advantages that international commercial arbitration has over litigation in court in transnational litigation matters.

Question 2

List and explain the main differences between ad-hoc arbitration and institutional arbitration. Identify cases where you would advise your client to adopt ad-hoc instead of institutional arbitration.

Question 3

Describe the scope and binding nature of the following rules: (i) New York Convention; (ii) UNCITRAL Model Law; (iii) UNCITRAL Arbitration Rules; (iv) ICC Rules of Arbitration.

Question 4

What are the form requirements of an arbitration agreement?

Question 5

What are the negative effects of the *kompetenz-kompetenz* doctrine and what is the approach of American and French courts on this doctrine?

Question 6

What are the different approaches adopted by US courts with reference to the problem of discovery in arbitration? Your answer should consider only cases covered in our course on this matter.

Question 7

What is the *lex arbitri* and what is its scope?

Question 8

Explain briefly the nature and scope of the following procedures and the law applicable to each one of them: (i) confirmation of an arbitration award, (ii) set aside of an arbitration award, (iii) enforcement of a foreign arbitration award.

Question 9

In the *Pepsico v. Oficina Central* case, the US District Court defers to the Venezuelan court to decide the arbitrability issue. What would be the effect of a decision by the Venezuela court that the dispute is not arbitrable? Would this decision be binding over the US court? Also, if both the Venezuelan and the US court decide that the dispute is arbitrable and refer the case to arbitration, can the arbitrators still refuse to exercise jurisdiction over the dispute?

Question 10

In the *Dallah* case, the UK and French courts reach completely different conclusions by analyzing the same facts. Which decision do you find more persuasive and why?

ESSAY

Party A is a company based in the United States. Party B is based in Germany and it manufactures LCD displays through a manufacturing facility based in Italy, fully owned by Party B. These parties enter into a contract, according to which Party B will sell to Party A 100,000 LCD displays to be used in a new smartphone that Party A intends to sell in the United States. The contract has the following clause:

“This Agreement shall be governed and construed in accordance with the laws of Germany, without regards to its conflict of laws rules. All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce. Each party shall appoint an arbitrator. The third arbitrator shall be appointed by the President of the International Court of Justice in The Hague. Arbitration will be held in Madrid, Spain.”

A dispute arises between the parties concerning the quality of the LCD displays. Party A, in fact, realizes that Party B has used a chemical in the manufacturing process of its LCD displays, which is considered toxic and it is prohibited in the United States. The same chemical is prohibited in all of the European countries, except Germany and Italy. Germany used to prohibit the use of this chemical but it does not do that anymore as long as manufacturing companies adopt specific safety measures. Party B adopts the required safety measures and it has received an approval from the German government to continue the production of LCD displays.

Party A wants to terminate the contract and asks Party B to reimburse the company for the advance payment that was provided at the time of the execution of the contract. Party B refuses to terminate the contract and to reimburse the payment because it states that the contract did not prohibit the use of any chemical.

Party A decides to submit the dispute to arbitration. Each party appoints an arbitrator. The ICC directly appoints the third arbitrator. None of the parties raise any formal challenge over this appointment and they sign the terms of reference provided by the arbitrators.

During the proceeding, Party B asks the tribunal to reschedule the date of one of the hearings to accommodate the speaking schedule of one of Party B's witnesses. Party B explains to the tribunal that the witness was previously scheduled to present the commencement speech at Chapman Law School in the United States. The arbitrators reject the request and no additional hearing is scheduled.

The arbitrators find for Party A and they state that Party B knew that the LCD displays would have been used in the U.S. and that the chemical used in their products was prohibited in the U.S.

The tribunal issues the final award, states that the contract is terminated and orders Party B to reimburse the advance payment to Party A, plus interests and attorneys' fees.

Party B intends to challenge the arbitration award and comes to your office to evaluate the options available. Your client asks you the following questions.

1. Where should Party B file its request to set aside the arbitration award? Which arguments could Party B use? What is the likelihood of success of its request?
2. Assuming that Party B's attempt to set aside the award fails and that Party A tries to enforce the award in Germany, will Party B have a chance to challenge the award another time? Which new argument, if any, may Party B use before the German court to avoid the enforcement of the award? What would be the likelihood of success?