

STUDENT EXAM NO.

**Final Examination
International Commercial Arbitration – Fall 2011
Professor Stacie Strong
University of Missouri School of Law**

INSTRUCTIONS

1. This is a take-home examination that will be sent to you by email (at your Mizzou email address) at 8:30 a.m. on December 16. If it is a problem to get your exam by email, you may pick up the exam in room 203. In any case, **YOU MUST RETURN YOUR ANSWER SHEETS BY EMAIL IN THE FORM OF A WORD DOCUMENT ATTACHED TO THE EMAIL.** Do NOT include the text of your exam in the body of the email. Emailed responses MUST include the phrase “International Commercial Arbitration – Strong” in the Re line. Emailed responses MUST show the time stamp “sent” within the six-hour exam period (i.e., must be marked “sent” at or before 2:30 p.m.). Please note that this is a different rule than that used for the mock arbitration exercise, which focused on the time of receipt.

Emailed responses MUST be sent to Cheryl Poelling (poellingc@missouri.edu) – the same person who sends the exam to you.

Your grade may be reduced if you submit your exam after 2:30 p.m.

2. You must use exam identification numbers from room 203, which you should pick up in advance. **BE SURE TO INCLUDE A COVER SHEET WITH YOUR EXAM NUMBER AND THE PROFESSOR’S NAME. NUMBER YOUR PAGES AND PUT YOUR EXAMINATION NUMBER ON EACH PAGE OF YOUR ANSWER SHEETS IN A HEADER OR FOOTER** in case the sticker becomes separated from your exam answer. Do not put your name on the exam or your answer sheets and do not identify yourself in any way in your exam answers. **YOU MAY NOT RETAIN OR SHARE AN ELECTRONIC OR HARD COPY OF THE EXAM QUESTIONS.**

3. This exam consists of two (2) essay questions, which each count for 33% of your final exam grade, and four (4) short answer questions, which cumulatively count for 34% of your final exam grade. The questions appear on five (5) pages, including this page. You must answer each question. Define and apply relevant concepts whenever appropriate. Focus your answers to address the questions asked.

4. **THE ANSWER TO EACH ESSAY QUESTION IS LIMITED TO A MAXIMUM OF FIVE (5) PAGES. THE ANSWER TO EACH OF THE SHORT ANSWER QUESTIONS IS LIMITED TO A MAXIMUM OF ONE (1) PAGE EACH.** Each answer must be self-contained. Do not “incorporate by reference” any material from one answer to another. Some questions are made up of subquestions. You are not required to answer the subquestions in the order in which they appear or to label the portions of your answer accordingly, though you may choose to do so if it helps to write a coherent

and persuasive answer. You must type or word-process your answers. Pages must be 8½" by 11" with minimum 1" margins on all sides. Type must be double-spaced in 12-point Times New Roman type or another font that is similar in size and easily readable. The answer to each question must begin on a new page. Put page numbers on all answer sheets. **ANSWERS OR PORTIONS OF ANSWERS NOT CONFORMING TO THESE INSTRUCTIONS MAY BE DISREGARDED.**

5. This is a take-home exam for which you may consult your notes, the textbook, or any written materials. You may not consult any person or receive any other type of assistance.

6. The honor code applies to this take-home examination. You must perform all work on your own and abide by the instructions on this page.

Essay Question No. 1 (33%)

You represent Venture Vistas, a U.S.-based venture capital group that has invested in Make 'Em Work, a manufacturing plant based in the Czech Republic, along with Manufacturing Minds, a Hungarian manufacturer of complex goods incorporating the materials made by Make 'Em Work. The agreement between Venture Vistas and Manufacturing Minds includes a dispute resolution clause indicating all disputes are to be resolved through arbitration seated in London under the LCIA Rules. There are to be three arbitrators, with Venture Vistas and Manufacturing Minds each naming one arbitrator and those two arbitrators naming the chair.

A dispute has arisen and Venture Vistas has initiated arbitration properly under the LCIA Rules. It is now time to name arbitrators. Venture Vistas wants to name Natasha Nottingham, a British barrister who is also admitted to the New York bar. Two years ago, Natasha sat as an arbitrator on the same panel as counsel for Manufacturing Minds.

Manufacturing Minds names Dudley Do-Right, a strong personality and a shining light in the world of international arbitration, with a fantastic reputation for intelligence and fairness. However, your research shows that, in his last eight arbitrations (none of which were for Manufacturing Minds, who he has never apparently dealt with), he has consistently sided with manufacturers rather than investors. Three of these eight arbitrations involved the international law firm acting for Manufacturing Minds: in two, Dudley was named by the firm and in one, Dudley acted as the chair of the panel.

What types of submissions and/or actions do you (Venture Vistas) make concerning the nomination of arbitrators? How is the LCIA likely to respond?

Before the LCIA responds to the parties' initial submissions, you and your client decide that Make 'Em Work should be made part of these proceedings, and you serve notice of the arbitration on Make 'Em Work, with a properly noticed courtesy copy to Manufacturing Minds and the LCIA. Assume, for the purposes of this question, that you will be able to successfully argue that Make 'Em Work should be a party to this arbitration even though Make 'Em Work is not a signatory of the arbitration agreement between Venture Vistas and Manufacturing Minds. What course of action is the LCIA likely to take regarding the appointment of arbitrators and why is that defensible as a matter of law and policy?

Essay Question No. 2 (33%)

You represent Lonesome Loser, Ltd., a toy manufacturer based in Hong Kong. Lonesome Loser has just been ordered to pay \$5 million dollars to Winsome Winnie, Inc., the international distributor of the Lonesome Loser dolls, as a result of an international arbitration conducted in Germany. Winsome Winnie is based in the United States. The final award includes \$3 million in punitive damages. The arbitration was ad hoc, and the arbitration agreement reads:

All disputes under this contract will be resolved through binding arbitration held in Frankfurt, Germany.

Elsewhere, the contract specifies that it will be governed by United States law.

Lonesome Loser is pursuing an action to set aside the award in Germany based on the fact that punitive damages are contrary to German public policy. The action was denied at the trial level, but Lonesome Loser is appealing the decision.

Lonesome Loser has assets in France and the United States.

What additional defensive steps might Lonesome Loser take as a procedural matter? What offensive steps might Winsome Winnie take as a procedural matter, and how will Lonesome Loser respond? What is the likelihood of success on each of these grounds?

Short Answer Questions (cumulatively, 34%)

The response to each of the following questions is limited to one page of text each

- A. You represent a mid-size (Mid-Co) company based in Missouri. Mid-Co would like you to draft an arbitration clause for a contract that Mid-Co has negotiated with Big Biz, a large Australian manufacturer, which will allow Mid-Co to act as Big Biz's non-exclusive North American distributor of widgets. The parties have decided that they want any arbitration to go forward in London. Big Biz has proposed going forward under either the UNCITRAL Arbitration Rules or the ICC Arbitration Rules, and Mid-Co needs to pick one of those two sets of rules. Please (1) draft the necessary arbitration agreement in its entirety and (2) identify three reasons why you have chosen the rule set that you have (i.e., either the ICC Rules or the UNCITRAL Rules).
- B. Describe the hierarchy of norms (i.e., legal authority) applicable to international arbitration. Provide a theoretical justification explaining the hierarchy, as you have described it.
- C. Identify three ways a non-signatory to an arbitration agreement may become a party to an arbitral proceeding. Justify these devices as a matter of authority and theory.
- D. Gary Born has distinguished between "border skirmishes," which reflect entirely appropriate interactions between courts and tribunals, and "border incursions," which involve a somewhat pathological overstepping of judicial boundaries. Describe what falls into each category of cases, using concrete examples as appropriate.