



International Commercial Arbitration (Legal Practice)

23 June 2017

Duration: 120 minutes

- Please check both at receipt as well as at submission of the exam the number of question sheets. The examination contains 2 pages and 3 questions.

Notes on solving the questions

- In your answer to the questions please examine and refer to all problems raised.

Notes on marking

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

Question 1	10	20 % of total points
Question 2	20	40 % of total points
Question 3	20	40 % of total points
Total	<hr/> 50 points	<hr/> 100 %

We wish you a lot of success!

A Basketball player (« P ») domiciled in France enters into a player contract (« Contract ») with the Club (« C ») located in Germany for the basketball season 2015/2016. The Contract provides – inter alia – that P shall be employed by C as a skilled basketball player in return for a total remuneration of EUR 200'000 per annum. The Contract (which is signed by P and C) contains an arbitration clause (sec. 11) that reads as follows :

“Any dispute arising from or related to this contract shall be submitted to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, and shall be decided by a Sole Arbitrator appointed by the General Secretary of the CAS. The parties to this contract herewith waive any appeal against the award to the Federal Tribunal.”

The Contract was negotiated on behalf of the Athlete by his agent (« A »), who is domiciled in Switzerland. The Contract, which is not signed by the Agent, however, provides a couple of provisions referring to the agent A. These provisions read as follows:

Sec. 5 : « The Club shall pay to A an agent fee in the amount of EUR 50'000 payable after P has successfully passed his medical check with the Club. »

Sec. 7 : « All correspondence and communication by the Club to P shall be sent in copy to the agent A. »

Sec. 8 : « In case the Club is 60 days late with any payment obligations arising from the Contract (including the payment of the agent fee) the player P is entitled to terminate the Contract immediately.»

After executing the Contract and successfully passing his medical check, P participated in the Club's first three official matches. Because P was caught doping prior to the fourth match, the Club terminated the Contract with immediate effect. In view of this early Contract termination the Club decided not to pay the agent fee to A.

3 months after the termination of the Contract, A initiates arbitration proceedings against C before the CAS and requests the payment of the agent fee. The General Secretary appoints the attorney-at-law (« D ») as Sole Arbitrator. D accepts his nomination and decides that the language of the arbitration proceedings shall be English.

- 1. Club C seeks your legal advice whether or not it can appeal the appointment of D by the CAS General Secretary and D's decision to conduct the proceedings in English according to Art. 190 of the Swiss Private International Law Act (PILA).**

C wants to contest the jurisdiction of the CAS with respect to the claim filed by A on the ground that there is no valid arbitration agreement.

- 2. a) Examine whether or not there is a valid arbitration agreement.
b) How will the Sole Arbitrator treat C's objection to CAS jurisdiction procedurally?
c) Would the outcome under (a) change, if C had challenged CAS jurisdiction in the hearing and not in its written answer to A's Request for Arbitration?**

d) Would the outcome under (a) change, if C submits that it had not only terminated the Contract ex nunc, but rescinded the Contract ex tunc on the grounds of mistake, because P had concealed from it that he had a doping problem?

In a second proceeding the Sole Arbitrator D has issued an award obliging C to pay EUR 100'000 to P. P seeks enforcement of this award against C in Switzerland, where C has bank accounts and other property. C opposes enforcement of the award on the grounds that

- (i) labour law disputes are not arbitrable under German and French law;
- (ii) the Sole Arbitrator's reasoning is based on the application of a provision of Swiss law that was neither pleaded by the parties nor discussed at the hearing; and
- (iii) that the Sole Arbitrator is a partner in the lawfirm DDD. DDD is a network of lawfirms operating in 6 different countries across Europe sharing a common brand name and a similar structure. In addition, DDD pools its resources in order to form and develop their respective associates. While the various branches of DDD in each of the individual countries form a single partnership that shares profits and losses, no such sharing occurs across borders, i.e., between the branches located in different countries. In addition, the partnerships in the various countries are legally independent from each other. C submits that D (who is a partner in Germany) did not disclose that the Swiss branch of DDD provided consultancy services on labour law to P prior to and during the arbitration proceedings.

3. What are the prospects of the award to be enforced? (please do not discuss any provisions of the SchKG¹)

¹ Swiss Debt Enforcement and Bankruptcy Act.

Exam Date	23.06.2017		
Examination No.			
Student ID			
Date of Correction			
	Points	Pts. Achieved	Comments
Question 1	10	0	
a) Applicability of Art. 190	1.5	0	
Applicability of Chapter 12 pursuant to Art. 176 PILA:			
- Seat in CH	0.5		
- At least one party domiciled abroad	0.5		
- Relevant point in time	0.5		
b) Decision subject to challenge?	5	0	
Types of challengeable awards under Art. 190 PILA	1		
Decision of D: procedural order, no implicit ruling on jurisdiction	2		
Decision of the General Secretary: mere administrative decision, but possibility to appeal the subsequently rendered award under art. 190(2)(a) PILA	2		
c) Waiver of the right to appeal (Art. 192 PILA)	3.5	0	
Addressing whether the relevant parties are the parties to the agreement or the parties to the arbitral procedure	1.5		
Addressing / discussing domicile requirement in relation to A	1		
Addressing / discussing “express statement” requirement in relation to A as third party	1		

Question 2a	12	0	
a) Substantive validity of the arbitration agreement	7.5	0	
Applicable law under Art. 178(2) <i>in favorem validatis</i>	1		
Minimal content of arbitration agreement under Swiss law:			
- Agreement to submit dispute to arbitration	1		
- Specified subject-matter of the dispute	1		
Participation of A as third-party agent rather than party	0.5		
Extension of arbitration agreement to A as non-signatory third party due to			
- A's involvement in the performance of the contract (-)	2		
- A's role as third-party beneficiary (+)	2		
b) Formal validity of the arbitration agreement	3.5	0	
Art. 178(1): written form, no signature necessary	1.5		
In case of extension to third parties, observance of formal requirements regarding the original parties (here P and C) is sufficient	2		
c) Arbitrability	1	0	
Art. 177(1): arbitrability of all pecuniary claims	0.5		
Claim for agency fee is pecuniary and thus arbitrable	0.5		

Question 2b	4	0	
Art. 186(1): arbitral tribunal is competent to decide on its own jurisdiction	1		
Art. 186(3): arbitral tribunal will normally rule by means of a preliminary award	1		
However, tribunal may rule on jurisdiction in a final award together with the merits of the case, in particular if: - jurisdiction is closely linked to the merits; or - the jurisdictional objection is considered dilatory	2		
Question 2c	2	0	
Art. 186(2): jurisdictional objection must be raised prior to any defence on the merits	1		
Failure to raise the objection in the answer to the request for arbitration will normally bar C from raising the objection during the hearing	1		
Question 2d	2	0	
Art. 178(3): validity of arbitration agreement is separate from validity of main contract	1		
Even if C rescinds the main contract, the CAS remains competent under the arbitration clause.	1		

Question 3	20	0	
a) Applicability of NYC	2	0	
Reference to the NYC under Art. 194 PILA	0.5		
Requirement of a “foreign” award under Art. 194 PILA / Art. I(1) NYC (-)	0.5		
Art. 192(2) PILA: in cases of valid waiver of the right to appeal, NYC applies by analogy to the enforcement of the award in Switzerland	1		
b) Valid waiver under Art. 192(1) PILA?	3	0	
Requirements:			
- no domicile / habitual residence / business establishment in CH (+)	1		
- Express statement indisputably reflecting a common intention to waive their right to appeal (+)	1		
- Inclusion in arbitration agreement or subsequent agreement (+)	1		
c) Grounds for refusal of enforcement under the NYC	15	0	
Grounds for refusal under Art. V(1) NYC reviewed on the motion of a party vs. <i>ex officio</i> review of grounds for refusal under Art. V(2) NYC	0.5		
(i) Lack of arbitrability (Art. V(2)(a) NYC):	0.5		
- Art. V(2)(a) NYC refers to the law of the country where recognition and enforcement is sought (i.c. Swiss law)	1		

- Labour law disputes are pecuniary claims and thus objectively arbitrable under Art. 177(1) PILA	1		
(ii) Violation of the right to be heard (Art. V(1)(b) NYC):	0.5		
- Right to be heard confined in principle to questions of fact	1		
- Regarding legal questions, the right to be heard is restricted by the <i>jura novit curia</i> principle. It is only violated where the arbitral tribunal applies a legal provision which (1) was not referred to by the parties, and (2) which the parties could not foresee as being material to the outcome of the case.	3		
(iii) Violation of public policy (Art. V(2)(b) NYC):	0.5		
- Art. V(2)(b) NYC refers to the law of the country where recognition and enforcement is sought (i.c. Swiss law)	1		
- Independence and impartiality of arbitrators as part of public policy	0.5		
- Requirement results from Art. 30 of the Swiss Constitution and applies equally to judges and arbitrators	0.5		
- Principle violated where an objective fact creates an appearance of partiality (subjective impressions insufficient)	1		
- Partiality may be assessed by reference to the IBA Guidelines even if they do not have legal status.	1		
- In the present case,	1		

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different instances from the Guidelines' Orange List (3.1.4, 3.2.1, 3.2.3) or Green List (4.2.1) may come into play - Analysis of the case in light of (1) the legal and fiscal independence of DDD's branches, and (2) the fact that the branch advising P is not located in the same country as the branch where D is a partner	2		
TOTAL	50	0	