



Introduction to Sports Law

27 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 4 pages and 2 questions.

Notes on marking

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

Part I	65 %
Part II	35 %

Total	100 %
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We wish you a lot of success!

Part I (Weight: 65 %)

The International Modern Inline Skating Federation (IMISF) is domiciled in Lausanne, Switzerland. It organizes the sport of inline skating (roller blading) on an international level. It also organizes several international inline skating races in various cities in Europe.

All participants in events organized by IMISF are obliged to sign a declaration, according to which they accept to be bound by the applicable IMISF General Regulations. If an Athlete refuses to sign such a declaration, he/she will not be allowed to participate in an IMISF event.

Thomas Miller is a professional roller blading athlete of Swiss nationality. In 2014, he participates in the "London Rollerblade Race" (organized by IMISF). The London Rollerblade Race takes place on 31 May each year.

Mr. Miller finishes the race in the 4th place.

During the race, Mr. Miller is in the lead for several kilometers. Only on the last kilometer, he suddenly falls and does not get up until three other athletes have passed. On TV images, no reason can be seen for the sudden fall of Mr. Miller, and it is unclear why he does not take up racing immediately again. It also appears that his fall was deliberate, as it occurred in a rather slow part of the course. Once the three other athletes have passed Mr. Miller, he takes up racing again at full speed.

Shortly after the race, local police informs the IMISF that the brother-in-law of Mr. Miller placed a substantial amount of money with a Dublin-based betting company, betting that Mr. Miller would finish the race in the 4th position.

In November 2014, the "Admission Board" of the IMISF refuses to admit Mr. Miller to participate in the 2015 London Rollerblade Race. The Admission Board suspects Mr. Miller of having been involved in "race fixing activities". The 2015 London Rollerblade Race takes place without the participation of Mr. Miller.

In August 2015, the "Disciplinary Board" of the IMISF initiates disciplinary proceedings against Mr. Miller. By decision of 25 October 2015, the Disciplinary Board bans Mr. Miller from participating in the 2016 edition of the London Rollerblade Race because of his involvement in race fixing activities.

Mr. Miller lodges an Appeal before the Court of Arbitration for Sport (CAS) against the decision of the Disciplinary Board. He requests a Stay of Execution of the decision of the Disciplinary Board, which is however rejected. A CAS Panel of three Arbitrators is formally constituted on 27 November 2015.

On 20 January 2016, a Hearing is held at the CAS Headquarters in Lausanne, Switzerland. At the outset of the Hearing, both parties confirm that they have no objection to the composition of the Panel. The Hearing lasts for six hours, during which experts and witnesses are heard. The legal representatives of both parties also make lengthy oral pleadings. At the closure of the Hearing, the legal representatives confirm for both parties that their right to be heard and their right to equal treatment has been respected.

On 4 June 2016, CAS renders its Award. CAS considers, inter alia, that on a balance of probabilities, it was more likely than not that Mr. Miller was involved in race fixing activities. It therefore rejects the Appeal of Mr. Miller and confirms the validity of the suspension from the 2016 race.

Question

On 5 June 2016, Mr. Miller approaches you and asks whether there is any legal remedy he can take against this CAS Award. He would like to receive a detailed analysis of possible legal grounds to challenge this Award and an assessment of his chances of success.

Note: Relevant provisions of the "IMISF General Regulations" on the following page

The "IMISF General Regulations" contain the following provisions:

(...)

The Admission Board of the IMISF is competent to decide on the admission of participants to IMISF races. The Admission Board has the right to refuse admission if, on a balance of probabilities, it considers that a participant was involved, directly or indirectly, in race fixing activities. This administrative measure shall protect the integrity of IMISF races and prevent that suspicious participants are allowed. Further disciplinary measures remain reserved.

(...)

The Disciplinary Board may impose a ban on an athlete, valid for one year or for one specific race, in case the Disciplinary Board concludes, on a balance of probabilities, that the athlete was involved directly or indirectly in race fixing activities. This sanction is the maximum penalty available. It cannot be increased in cases of recidivism.

(...)

Decisions of the Disciplinary Board are subject to an Appeal in front of the Court of Arbitration for Sport (CAS) with its seat in Lausanne, Switzerland. Decisions of CAS shall be rendered by a Sole Arbitrator, and they shall be final and binding.

(...)

Part II (Weight: 35 %)

The European Volleyball Confederation (EVC) is the governing body of Volleyball at European Level. It has its seat in Geneva (Switzerland). The EVC organizes various volleyball events, among others in Germany, France, the UK, Italy and Spain. The EVC generates revenues through the selling of TV-rights in its competitions, the conclusion of sponsorship agreements, the selling of tickets, etc.

The EVC has all European national Volleyball federations as its members. The national federations generate their revenues similarly to the EVC on their respective national level. Each national Volleyball federation has one vote in the EVC annual Congress.

Recently, international investment funds have started to hold "economic participation rights" in individual Volleyball players. These participation rights allow the funds, among other things, to participate in transfer compensations paid for the respective players, and they also give the funds the right to influence (and sometimes force) transfers of players between clubs, in particular for international transfers.

The EVC is concerned that such investments may be problematic, in particular that they could harm the integrity of international and national competitions, trigger conflicts of interests for players or clubs involved in such investment schemes and that they could damage the trust of the public in the regularity and honesty of the competitions. The EVC also finds such investments problematic from an ethical point of view. The EVC therefore plans to introduce a complete prohibition of such investments in new Regulations, which shall be formally adopted by the next EVC annual Congress.

Question

Prior to its next Congress, the EVC approaches you and requests a legal analysis. The EVC would like to know whether these Regulations may infringe art. 101 of the Treaty on the Functioning of the European Union (TFEU). In case there is a risk of infringement, the EVC would like to know how this risk can be reduced.

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Die folgende Skizze gibt die Gliederung der zu behandelnden inhaltlichen Aspekte vor; bei der Klausur wurde eine ausformulierte Argumentation erwartet. Die angegebenen Punktezahlen sind Höchstpunktezahlen. Die Vergabe der vollen Punktezahl setzt einen systematischen Aufbau der Anspruchsprüfung, die saubere Subsumtion des Sachverhalts unter die gesetzlichen Tatbestandselemente und eine fallbezogene Problemerkörterung voraus.

Part I

Issue	Points ¹
Permissible Remedy	
The legal remedy to challenge an Award of CAS is a Civil Law Appeal to the Swiss Federal Tribunal (Art. 190 PILA)	0.5-1.0
A Civil Law Appeal grants no full substantial review of the Award rendered by CAS, but only a test against the exhaustive list of specific grounds for Appeal contained in Art. 190 PILA	
The decision under Appeal is a final award by CAS (no interim Award), so the full list of grounds for Appeal under Art. 190 para. 2 PILA can be invoked	
First Problem: Did Thomas Miller waive his right to Appeal?	
The IMISF General Regulations state that decisions of CAS shall be final and binding . This can be interpreted as a possible waiver of the right to challenge the CAS Award before the Swiss Federal Tribunal (Art. 192 para. 1 PILA).	Problem recognized: 0.5-1.0
However: A waiver is only possible if neither party has its residence, legal domicile or habitual residence in Switzerland (Art. 192 para. 1 PILA). Since the IMISF is domiciled in Switzerland, no waiver under Art. 192 para. 1 PILA is possible.	Argumentation: 0.5-1.0

¹ Generally indicated as a maximum, depending on an adequate description of the problem (with reference to the present case) and/or the level of argumentation.

<p>In addition, a waiver is likely not to be enforceable since it is not given voluntarily (no participation in races is possible if an Athlete refuses to sign the declaration to adhere to regulations). See “Cañas” decision of the Swiss Federal Tribunal (133 III 235).</p>	
<p>Second Problem: Does Thomas Miller have a sufficient legal interest to lodge a Civil Law Appeal in front of the Swiss Federal Tribunal?</p>	
<p>Problem: The CAS Award is rendered on 4 June 2016, but the 2016 edition of the London Rollerblade Race is held on 31 May 2016 (it is held on 31 May each year).</p> <p>Since no stay of execution was granted, Mr. Miller already served his suspension because he could not take part in the 2016 edition of the race.</p> <p>Therefore, a legal challenge of the CAS Award <u>after</u> this race seems to have no impact on the legal position of Mr. Miller. It is therefore questionable if he has a sufficient legal interest on 5 June 2016.</p>	<p>Problem recognized:</p> <p>0.5-1.0</p>
<p>The legal interest is also questionable since the Regulations state that no increased sanction will be imposed in the future for recidivism, so the future legal position also does not seem to be compromised as a “<i>repeated offender</i>”.</p> <p>(other than, e.g., SFT decision 4A_576/2012)</p> <p>However, other argumentation accepted, e.g. that the Athlete has a sufficient legal interest to protect his “<i>sporting reputation</i>”.</p> <p>It is primarily important that students recognize the problem. All solutions are accepted if they are argued well.</p>	<p>Argumentation:</p> <p>0.5-1.5</p>
<p>The argument alone that the athlete could want to lodge a Civil Law Appeal to prepare a claim for damages is likely not to be sufficient.</p>	

Possible Grounds for Appeal	
Composition of the Panel (Art. 190 para. 2 lit. a PILA)	
Problem: The Regulations provide for a Sole Arbitrator, but a Panel of three was appointed. This could constitute a valid ground for Appeal (cf. 139 III 511)	Problem recognized: 0.5
<p>However: In the decision 139 III 511, a Sole Arbitrator was appointed instead of a Panel of three. In this case, the situation is inversed. It is not entirely clear if the SFT would adopt an identical decision, since one could argue that a Panel of three provides for a “more thorough” decision-making process and is therefore “better” than a Sole Arbitrator. On the other hand, a Panel of three leads to an increase of costs.</p> <p>It is primarily important that students recognize the problem. All solutions are accepted if they are argued well.</p>	Argumentation: 0.5-1.5
<p>In addition, it is very likely that Mr. Miller forfeited his right to Appeal, since at the outset of the CAS Hearing, it was declared that no parties had an objection to the composition of the Panel.</p> <p>Under the case law of the Swiss Federal Tribunal, it is highly likely that against this background, a challenge of the CAS Award for an improper constitution of the Panel will not be accepted.</p>	
Additional problem: The formal constitution of the Panel on 27 November 2015 would very likely have to have been challenged directly, which was not done.	
Jurisdiction of CAS (Art. 190 para. 2 lit. b PILA)	
There is a clause in the Regulations of IMISF providing for CAS jurisdiction.	0.5
Statutory arbitration clauses are generally accepted under the case law of the Swiss Federal Tribunal.	0.5

<p>No indication that jurisdiction can successfully be challenged, in particular because it was Mr. Miller himself who lodged an Appeal at CAS</p>	
<p><i>(Additional reference to the Pechstein case of the German Federal Supreme Court and the problem whether an arbitration clause, which is not concluded completely voluntarily, is valid or not.)</i></p>	
<p>Ultra/Infra Petita (Art. 190 para. 2 lit. c PILA)</p>	
<p>No indication that a ground for appeal under Art. 190 para. 2 lit. c PILA could be successfully invoked.</p>	<p>0.5</p>
<p>Equal Treatment/Right to be Heard (Art. 190 para. 2 lit. d PILA)</p>	
<p>No indication that a ground for appeal under Art. 190 para. 2 lit. d PILA could be successfully invoked.</p>	<p>0.5</p>
<p>In particular, both parties declared that their right to be heard and their right to equal treatment has been respected.</p> <p>Under the case law of the Swiss Federal Tribunal, it is highly likely that against this background, no successful challenge can be made under Art. 190 para. 2 lit. d PILA any longer.</p>	<p>0.5</p>
<p>Public Policy (Art. 190 para. 2 lit. e PILA)</p>	
<p>First possible problem: <i>Ne bis in idem?</i></p> <p>Mr. Miller may have been sanctioned twice for the same infringement, once with a non-admissibility, once with a subsequent ban. This can be an issue of <i>ne bis in idem</i>.</p>	<p>Problem recognized:</p> <p>0.5-1.0</p>
<p>All arguments accepted, e.g.:</p> <ul style="list-style-type: none"> - Non-admissibility and subsequent ban are de facto both a punishment, and they are both imposed for the same facts and reasons. Therefore, there is a problem of <i>ne bis in idem</i>; 	<p>Argumentation:</p> <p>0.5-1.0</p>

<ul style="list-style-type: none"> - On the other hand, the two measures have different purposes, different bodies imposing them, different reasonings and a different standard of proof. <p><i>(Possible reference to “Fenerbahce” decision of the Swiss Federal Tribunal)</i></p>	
<p>Second possible problem: Presumption of innocence?</p> <p>The ban was imposed because CAS considered that on a balance of probabilities, it was more likely than not that Mr. Miller was involved in race fixing activities. This is a very low standard of proof.</p> <p>Because the suspension of Mr. Miller is de facto a punishment, similar to a criminal sanction, CAS may have violated the presumption of innocence.</p>	<p>Problem recognized:</p> <p>0.5-1.0</p>
<p>All arguments accepted, e.g.:</p> <ul style="list-style-type: none"> - The IMISF is likely to be incorporated under civil law (although not entirely clear from the facts). It is, in any event, no state actor. Criminal law standards (such as the presumption of innocence) do not apply to measures imposed by private bodies; - However, the applied standard of proof is indeed very low, e.g. lower than the usual standard of “<i>comfortable satisfaction</i>” applied by CAS in disciplinary cases; - However, this is expressly provided for in the regulations, and IMISF is bound by its own regulations; <p>In addition, the suspension of the Athlete is nothing else than a ban to exercise his profession, which can be considered as a criminal sanction.</p>	<p>Argumentation:</p> <p>0.5-1.0</p>
<p>Reference to case law of the Swiss Federal Tribunal, according to which measures of private associations are of civil law nature and that they are not to be tested against standards of criminal law or the ECHR</p>	
<p>TOTAL POINTS FOR PART I</p>	<p>14.5</p>

Part II

Issue	Points ²
<p>It must be tested whether the envisaged Regulations may violate art. 101 of the TFEU and if so, measures shall be described how this risk can be reduced.</p>	0.5
<p>Preliminary Remark:</p> <p>In the Meca Medina case, the ECJ considered that sporting regulations have to be tested against European Competition law, even if other aspects of European law (such as fundamental freedoms under the TFEU) may not apply to the regulations in question.</p> <p>(Meca Medina v/ Commission, C-519/04 P)</p>	
<p><i>The case is similar to CAS 2016/A/4492 and TAS 2016/A/4490</i></p> <p><i>(cases of UEFA Financial Fair Play Regulations and FIFA ban on third party ownership)</i></p>	
<p>First Issue: Could the envisaged regulations qualify as an <u>agreement between undertakings</u>, a <u>decision of an association of undertakings</u> or as a <u>concerted practice</u>?</p>	0.5
<p>Based on the facts of the case, the following is to be mentioned:</p> <ul style="list-style-type: none"> - The term undertaking is broadly construed: It encompasses any entity engaged in an economic activity, regardless of the legal status and regardless of the way in which it is financed; - The EVC and its national associations are likely to engage in economic activities, so that they are undertakings within the meaning of art. 101 TFEU: The generate revenue through the selling of TV rights, the conclusion of sponsorship agreements, selling of tickets, etc. - The EVC is therefore likely to be qualified as an undertaking and/or as an 	0.5-1.0

² Generally indicated as a maximum, depending on an adequate description of the problem (with reference to the present case) and/or the level of argumentation.

<p>association of undertakings;</p> <ul style="list-style-type: none"> - The envisaged Regulations are therefore likely to be qualified as an agreement between undertakings and/or as a decision of an association of undertakings. <p><i>(Past case law of CAS or of the ECJ has already qualified the IOC, UEFA or FIFA as undertakings.)</i></p>	
<p>Second issue: Do the Regulations have an anti-competitive object or effect?</p>	
<p>The objects pursued are not to distort or prevent competition, but rather sporting or sports-ethical objectives: The integrity of competitions, prevention of conflicts of interest, the trust of the public in the competitions, regularity and honesty of the competitions, ethical aspects of investments in players.</p>	0.5-1.0
<p>There may, however, be an anti-competitive effect, since it would no longer be allowed to freely make investments in players. This could be seen as a limitation on free competition.</p>	
<p>In such circumstances, the ECJ or CAS apply the “Wouters” test:</p> <ul style="list-style-type: none"> - Account must be taken of the overall context, in which the decision of the association of undertakings was taken or produces its effects; - Account must be taken of the objectives pursued; - It must be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives; - It must be considered whether the limitations on competition are proportionate. <p>Based on this test, even if there may be anti-competitive effects, it can be established that art. 101 is not violated.</p> <p>All arguments are accepted, e.g.:</p> <ul style="list-style-type: none"> - Legitimate objectives are pursued; - The restrictions on investments seem to be inherent to the achievement of 	0.5-1.5

<p>what is pursued by the Regulations;</p> <ul style="list-style-type: none"> - No alternative solutions appear to be feasible; - However, once can also argue that not a full ban on such investments, but also simply a strong regulation / limitation on certain investments, would be possible, so that a full ban is disproportionate. 	
<p>Measures that could be considered to further reduce the risk of an infringement of art. 101 TFEU:</p> <ul style="list-style-type: none"> - Introduce a transition period; - Introduce exemptions; - Introduce mitigation factors; - Introduce other mechanisms to prevent that the restrictions are disproportionate (all reasonable proposals accepted) 	0.5-1.0
<p>Third issue: Is there an effect on Trade between Member States?</p>	0.5
<p>Even though IMISF is domiciled in Geneva, it organizes various volleyball events in EU countries. It is therefore very likely that there would be an effect on trade between Member States of the EU.</p>	0.5
<p>TOTAL POINTS FOR PART II</p>	7.0