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## International Commercial Arbitration (Business Law)

23 June 2017

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**Duration:** 60 minutes

- Please check both at receipt as well as at submission of the exam the number of question sheets. The examination contains 1 page and 1 question.

**Notes on solving the questions**

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

**Notes on marking**

- Points are distributed to the questions as follows:

|            |                  |                       |
|------------|------------------|-----------------------|
| Question 1 | 20               | 100 % of total points |
| Total      | <u>20 points</u> | <u>100 %</u>          |

**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 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.

1. **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?**

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|--|---------------|-----------------|-----------------|
| <b>Exam Date</b>   | 23.06.2017    |                 |                 |
| <b>Examination No.</b>   |               |                 |                 |
| <b>Student ID</b>  |               |                 |                 |
| <b>Date of Correction</b>  |               |                 |                 |
|  | <b>Points</b> | <b>Achieved</b> | <b>Comments</b> |
| <b>Question 1a</b>   | 12            | 0               |                 |
| <b>a) Applicability of Art. 190</b>  | 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>a) Substantive validity of the arbitration agreement</b>  | 6.5           | 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   | 0.5           |                 |                 |
| - Specified subject-matter of the dispute  | 0.5           |                 |                 |
| 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>b) Formal validity of the arbitration agreement</b>   | 3             | 0               |                 |
| Art. 178(1): written form, no signature necessary  | 1             |                 |                 |
| In case of extension to third parties, observance of formal requirements regarding the original parties (here P and C) is sufficient | 2             |                 |                 |
| <b>c) Arbitrability</b>  | 1             | 0               |                 |
| Art. 177(1): arbitrability of all  | 0.5           |                 |                 |

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|--|-----------|----------|--|
| pecuniary claims   |           |          |  |
| Claim for agency fee is pecuniary and thus arbitrable  | 0.5       |          |  |
| <b>Question 1b</b>   | <b>4</b>  | <b>0</b> |  |
| 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:<br>- jurisdiction is closely linked to the merits; or<br>- the jurisdictional objection is considered dilatory | 2         |          |  |
| <b>Question 1c</b>   | <b>2</b>  | <b>0</b> |  |
| 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         |          |  |
| <b>Question 1d</b>   | <b>2</b>  | <b>0</b> |  |
| 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         |          |  |
| <b>TOTAL</b>   | <b>20</b> | <b>0</b> |  |