

INTRODUCTION TO SPORTS LAW / EXAM FS 2019

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

Part I

Issue	Points
Permissible remedy	4
The legal remedy to challenge an Award of CAS is a Civil Law Appeal to the Swiss Federal Tribunal (Art. 190 PILA)	
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	
SFT is bound by the facts established by CAS (Art. 105 BGG) → SFT may neither correct nor supplement the factual finding of CAS, even if it is obviously incorrect or based on an infringement of rights. In principle: no suspensive effect (Art. 103 BGG) and only cassatory effect (Art. 77 para. 2 BGG)	
Waiver of the right to appeal?	4
The arbitration agreement states that the decision of CAS would be " <i>final and non-appealable</i> ". This could indicate that the parties excluded the possibility to submit a Civil Law Appeal to the Swiss Federal Tribunal (Art. 192 PILA). Both parties are domiciled outside of Switzerland, so this would in principle be possible. Discussion whether this waiver is " <i>voluntary</i> " or not – all solutions accepted if properly argued, in particular with reference to the Cañas decision of the Swiss Federal Tribunal.	
Prerequisites for a Civil Law Appeal	5
Legitimate interests necessary; interests worthy of protection (Art. 76 BGG)	4
→ Possible argumentation of the IPC: No legitimate interests because Paralympic Games have already taken place at the time of the proceedings before the Swiss Federal Tribunal. The decision on the suspension emphasized that this was the main purpose of the suspension.	
→ Possible argumentation of the RPC: Nevertheless the membership rights are still suspended and the rights of the RPC are still affected.	

→ An interest to have a CAS decision overturned to prepare a future claim for damages is, in itself, likely to be insufficient.	
Deadline: 30 days (Art. 100 BGG). Emphasis that deadline expires very soon.	1
Assessment of specific grounds for Appeal contained in Art. 190 PILA (final list): <ul style="list-style-type: none"> ▪ Appointment/Constitution ▪ Jurisdiction ▪ Ultra petita / infra petita ▪ Equal treatment / right to be heard ▪ Public Policy 	3
Violation of the right to be heard	4
<p>Right to be heard includes the following: right to express itself about the relevant facts, to present its legal arguments, to present evidence, to participate in the proceedings, to have access to the files (however, in general not a right to receive a motivated award).</p> <p>Parties have no legal entitlement that they should specifically be heard on their legal assessment of the facts brought before the arbitral tribunal.</p> <p>However, the duty is violated when an arbitral tribunal disregards legally relevant statements, arguments, evidence or evidentiary requests for a party → But, the arbitral tribunal does not have to deal with every single argument of the parties.</p>	
<p>Possible argumentation of the RPC: the Russian athletes were not part of these proceedings but were affected of the decision → Therefore, their right to be heard is violated</p> <p>Possible argumentation of the IPC: The RPC cannot use the rights of the athletes in order to claim a violation of the right to be heard; a party cannot base its arguments on a violation of the right to be heard of a third party</p>	
Violation of Public Policy	4
<p>Procedural and material ordre public</p> <p>Procedural ordre public shall guarantee the parties of an arbitral procedure an independent examination of the facts, legal arguments and prayers for relief that were submitted; it is infringed if fundamental and general procedural principles are violated in a way which are fundamentally incompatible with the legal values of a state with the rule of law; subsidiary to equal treatment / right to be heard</p> <p>An arbitral award violates substantive ordre public if fundamental principles of the law are ignored, so that the award is incompatible with the fundamental and recognized values, which should exist in any legal system worldwide; examples: pacta sunt servanda, abuse of the law, prohibition of discrimination, principle of good faith, prohibition of excessive commitments.</p>	

<p>Possible argumentation of the RPC: Discussion whether it is possible to impose a "collective suspension" on athletes; it constitutes a very severe violation of their personality rights (right to exercise their profession)</p> <p>Possible argumentation of the IPC: Athletes are not party of these proceedings; a possible violation of their personality rights can therefore not be considered; SFT rejected the arguments regarding the violation of the ordre public</p>	
TOTAL POINTS FOR PART I	24

Part II

Issue	Points
Violation of the TFEU in general	6
<p>Adressee of the rules: The fundamental freedoms apply not only to the actions of public authorities but extend likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services (Walrave) → FIS and SSF are the only organizers of professional ski competitions. Their regulations regulating the individual marketing contracts are binding. Therefore, the rules of FIS and SSF regarding marketing contracts for Mr. K's helmet and headgear and the contested decision fall within the ambit of the free movement rules of the TFEU.</p>	2
<p>Material scope of application: If the regulations are of purely sporting interest, EU law does not apply; however, sport is subject to the laws of the European Union to the extent it constitutes an economic activity; when such activity has the character of gainful employment or remunerated services, it comes more particularly within the scope of the internal market rules (Walrave) → athletes' sponsorship contracts entail marketing services, which constitute, as such, an economic activity (economic activity is professional skiing, which entails two sources of income: prize money and advertising during the race)</p>	2
<p>Territorial scope of application: Cross-boarder element → Mr. K lives in Austria and Red Bull has its seat in Austria → But Mr. K is a Swedish national and takes part in professional ski races in several European states other than his state of establishment; these races are where he provides his services; therefore there is a cross-boarder element in this case.</p>	2
Breach of Art. 49 or Art. 56 TFEU	6
<p>The rules state that the SSF may grant or refuse permission to athletes to enter into individual marketing contracts, which will have an impact on Mr. K' possibilities to provide marketing services. In contrast, the rules will not, or only remotely, affect athletes' freedom to establish themselves as professional skiers, the activity from</p>	2

which their marketing activity derives → rules in question concern predominantly the freedom to provide services.	
Violation of Art. 56 TFEU (Freedom to provide services)	
<p>Service provider: Mr. K</p> <p>Place of establishment: where a person pursues a professional activity on a stable and continuous basis (not the place of residence) → Mr. K's professional activity has its stable and continuous basis in Sweden. His activity is joined to the Swedish national alpine skiing team and he competes in local and international skiing competitions under the Swedish flag; his participation is under SSF's auspices.</p> <p>Measures liable to hinder or make less attractive the exercise of a fundamental freedom guaranteed by the TFEU are an encroachment upon this freedom → Argumentation (taking into consideration the possibility to conclude a sponsorship agreement with members of the SSF "skipool")</p>	4
Justification of a restriction	12
<p>A sport-specific justification does not apply in the case at hand.</p> <p>Aims of a purely economic nature, such as the desire to increase profits, cannot justify a restriction on the freedom to provide services. The aim of the measure at hand appears, however, to be related to ensuring a stable basis for the SSF's activities, as a non-profit sports association. In particular, marketing revenues are by far SSF's most important source of income, as they amount to more than 70 % of its resources. The overall revenue generated is spent not only on a sporting scheme to support the professional athletes but also on a solidarity policy involving cooperation between the elite and popular level of skiing. This includes recruitment, education and children's and recreational sports. The objective of encouraging recruitment and training of young athletes has been accepted in case law as legitimate → Suitability, necessity and proportionality assessment necessary:</p> <ul style="list-style-type: none"> - Suitability: It is not clear how the income that the SSF receives from advertising contracts, inter alia for advertisements on helmet and headgear, is distributed within the organization. While it is reasonable that some of the income is dedicated to the professional athletes only, the income generated must benefit the legitimate aims identified above, such as recruitment, education, children's and recreational sports. Provided that a substantial part of the income is actually spent on the objective of encouraging the recruitment and training of young athletes, it appears that rules on prior control and consent for individual sponsorship contracts are suitable to achieve that objective → Argumentation - Necessity: The decisive question is whether the restriction goes beyond what is necessary in order to attain that objective → it must be assessed whether there are other less restrictive measures that would ensure a similar level of resources. The assessment of the system's necessity must take account of 	

<p>the fact that the SSF and the athletes are mutually dependent on one another. The market value of the sponsorship contracts must be attributed to the combined contributions of the SSF and the professional athletes. The system must therefore ensure that the athletes receive a fair share of the revenues from sponsorship contracts. If not, that would constitute a disproportionate restriction on the athletes' freedom to provide sponsorship services. This is so, in particular, since it appears that revenue generated from marketing contracts constitutes the most important source of income not only for the SSF but also for the athletes themselves. → SSF covers all expenses of members of the Swedish national alpine skiing team for approximately 200 days a year. Furthermore, the athletes may enter into individual sponsorship contracts with equipment providers in the SSF's "skipool" without SSF approval. Outside the "skipool" additional contracts may be entered into with the SSF's approval → Argumentation</p> <ul style="list-style-type: none"> - Proportionality: In this regard, in order to comply with the principle of proportionality, decisions taken under the SSF's system of prior control and consent for individual sponsorship contracts must be based on a fair balance between the interests of the SSF and the professional athletes → Argumentation 	
<p>TOTAL POINTS FOR PART II</p>	<p>24</p>