



Arbitration CAS 2013/A/3099 Beşiktaş Jimnastik Kulübü Derneği v. Allen Iverson, award of 30 August 2013

Panel: Mr Mark Hovell (United Kingdom), President; Prof. Martin Schimke (Germany); Prof. Lucio Colantuoni (Italy)

Basketball

Contract of employment

Article 186 of the Swiss PILA and CAS proceedings

Conditions for CAS jurisdiction according to Article R47 of the CAS Code

Wording of an arbitration clause referring to CAS arbitration to be inserted in a contract

1. Article 186 of the Swiss PILA applies to CAS proceedings. According to this provision, the CAS has the power to decide on its own jurisdiction. Swiss legal scholars consider this provision as the embodiment of the 'Kompetenz-Kompetenz' principle which is also regarded as a corollary to the principle of the autonomy of the arbitration agreements.
2. Article R47 of the CAS Code is the relevant provision regarding jurisdiction of CAS. This Article requires three separate criteria in order for the CAS to have jurisdiction over a claim, namely: a) a decision of a federation, association or sports-related body, b) an express grant of jurisdiction either through the statutes or regulations of that sports-related body or a specific arbitration agreement concluded by the parties, and c) the exhaustion by the Appellant of all legal remedies available to him prior to the appeal.
3. The FAT Arbitration Rules (2009 edition) include an optional wording to be inserted into arbitration clauses in playing contracts that provides for an appeal to the CAS. For the CAS to have jurisdiction, that wording must be inserted in the contract between the parties.

1. THE PARTIES

- 1.1 Beşiktaş Jimnastik Kulübü Derneği ("Appellant" or the "Club"), is a Turkish professional basketball club.
- 1.2 Mr Allen Iverson ("Respondent" or the "Player") is an American professional basketball player.

2. FACTUAL BACKGROUND

- 2.1 Below is a summary of the main relevant facts, as established on the basis of the parties' written submissions. Additional facts may be set out, where relevant, in connection with the legal discussion which follows.
- 2.2 On 30 May 2009, the Fédération Internationale de Basketball (hereinafter referred to "FIBA") Arbitral Tribunal ("FAT") Arbitration Rules (2009 edition) came into force.
- 2.3 On 1 May 2010, the FAT Arbitration Rules (2010 edition) came into force.
- 2.4 On 3 September 2010, the FIBA Internal Regulations 2010 were approved by the FIBA Central Board.
- 2.5 On 7 September 2010, the FIBA General Statutes 2010 came into force, under which the FAT was renamed the Basketball Arbitral Tribunal ("BAT").
- 2.6 On 29 October 2010, the parties entered into an employment contract for the 2010-2011 season ("Contract").
- 2.7 On 9 November 2010, the Respondent completed the medical examination organized by the Appellant and then began practising and playing with the Appellant's team.
- 2.8 In December 2010, the Respondent complained of pain in his right leg.
- 2.9 In January 2011, the parties agreed that the Respondent would need to undergo surgery and that it would be preferable if it were undertaken in the U.S.A.
- 2.10 The Respondent was treated medically in the U.S.A. from January 2011.
- 2.11 On 31 January 2011, the Appellant's lawyer sent a letter to the Respondent's agent stating that the Appellant had not received any information regarding the Respondent's medical treatment.
- 2.12 On 1 March 2011, in light of the medical situation of the Respondent, the Appellant notified the Respondent's agent that it deemed the Respondent's condition to pre-date his entry medical examination by the Appellant and to be unrelated to sports. The Appellant therefore announced that the Contract and all payments stemming there from were being suspended until the medical board of the Appellant determined the Respondent fit to play again with the Appellant's team.
- 2.13 On 16 and 22 March 2011, the Respondent contested the Appellant's position and requested the payment of USD [...], i.e. the suspended amount of payments due under the Contract.
- 2.14 On 23 March 2011, the Appellant responded and stated that it was refusing to pay the Respondent.

- 2.15 On 1 April 2011, the BAT Arbitration Rules (2011 edition) came into force.
- 2.16 On 15 September 2011, the Respondent filed a request for arbitration with the BAT (which body had assumed all responsibilities of the FAT) to claim his outstanding contractually-stipulated salary as the Appellant had not made the contractual payments to him.
- 2.17 By an award dated 30 January 2013 (“Decision”), the BAT condemned the Appellant to pay to the Respondent an amount of USD [...] as contractual damages, plus interest at 5% per annum on such amount from 1 March 2011 onwards. The Appellant was further condemned to pay to the Respondent an amount of EUR [...] as reimbursement of 50% of the latter’s arbitration costs and of 50% of the non-reimbursable fee he paid to the BAT.

3. PROCEEDINGS BEFORE THE CAS

- 3.1 On 21 February 2013, the Appellant filed a statement of appeal with the CAS pursuant to Article R47 of the Code of Sports-related Arbitration (“CAS Code”), against the Respondent with respect to the Decision. The Appellant submitted the following prayers for relief in its statement of appeal:
- “1. To accept this Appeal against the decision of Basketball Arbitral Tribunal dated 30 January 2013 and also against Mr Allen Iverson.
 2. To adopt an award annulling the decision of Basketball Arbitral Tribunal dated 30 January 2013.
 3. In the light of the above mentioned facts and legal considerations, Beşiktaş requests the Panel to decide that BAT have adopted an unlawful decision and also Mr. Allen Iverson has acted unlawfully and in bad faith in relation to the employment contract, therefore both Respondents should jointly be condemned to the payment to Beşiktaş Jimnastik Kulübü of an amount equivalent to the damage suffered by the club directly and indirectly because of the non-performance of Mr. Allen Iverson’s contractual obligations towards Beşiktaş, such damage having to be more precisely valued at a later stage of the proceedings and being, at this stage, and thus provisionally, valued at [...] USD.
 4. To fix a sum of 15.000 CHF to be paid by the Respondents to the Appellant to aid the Appellants? in the payment of its defence fees and costs.
 5. To condemn the Respondents to the payment of the whole CAS administration costs and the arbitration fees”.
- 3.2 On 4 March 2013, the CAS Court Office acknowledged receipt of the Statement of Appeal and informed the parties that the matter had been submitted to the Appeals Arbitration Division. The CAS Court office noted that the Appellant had taken the necessary steps to pay the CAS Court Office fee and that the language of the arbitration would be English.
- 3.3 On 7 March 2013, the Appellant filed its Appeal Brief. Together with its Appeal Brief, the Appellant applied for a stay of the Decision. According to the Appellant, “BAT’s decision is not applicable by FIBA or any other authority while there is a pending case before CAS. However, in any case, we would like the Panel to decide to stay the execution of the decision appealed against. Otherwise, if our club makes

the relevant payment as indicated at the BAT award we hardly see any option to receive it back from the Player when the decision form (sic) CAS comes out in our favour". Further, the Appeal Brief contained the following amended prayers for relief:

- “1. To accept this Appeal against the decision of Basketball Arbitral Tribunal dated 30 January 2013 and also against Mr Allen Iverson.
2. To adopt an award annulling the said decision of Basketball Arbitral Tribunal.
3. We are of the legal opinion that BAT’s decision is not applicable by FIBA or any other authority while there is a pending case before CAS. However, in any case, we would like the Panel to decide to stay the execution of the decision appealed against.
4. In the light of the above mentioned facts and legal considerations, Beşiktaş requests the Panel to decide that BAT have adopted an unlawful decision and also Mr Allen Iverson have acted unlawfully and in bad faith in relation to the employment contract, therefore both Respondents should jointly condemned to the payment to Beşiktaş Jimnastik Kulübü of an amount equivalent to the damage suffered by the club directly and indirectly because of the non-performance of Mr. Allen Iverson contractual obligations towards Beşiktaş, such damage having to be more precisely valued at a later stage of the proceedings and being, at this stage and thus provisionally, valued at [...] USD.
5. To fix a sum of 15.000 CHF to be paid by the Respondents to the Appellant to aid the Appellant in its defence fees and costs.
6. To condemn the Respondents to the payment of the whole CAS administration costs and the Arbitration Fee.
7. Also, we would like to have a hearing in this regard”.

3.4 On 11 March 2013, the CAS Court Office acknowledged receipt of the Appeal Brief.

3.5 On 21 March 2013, in accordance with Article R37 of the CAS Code, the Respondent filed his response to the Appellant’s request for a stay. In his response, the Respondent considered that the “Appellant uses Article R37 of the Code in bad faith and with the purpose to save time before making any payment to the Respondent. Moreover, Appellant is in no need for protection of irreparable harm as provided in Paragraph 5 of Article R37, on the other hand Respondent is”.

3.6 On 1 April 2013, the Respondent filed his Answer with the following prayers for relief:

“The Respondent and the Appellant entered into the Agreement dated 29 October 2010, with guaranteed compensation upon successfully passing the physical examination in due time. The Respondent had the physical examination in due time, provided the doctors with accurate and complete information and duly filled out the Information Sheet. The Appellant has made many false statements about the Respondent throughout the FIBA BAT arbitration process and continues to make these false statements in this CAS process. The Appellant’s claims related to the Respondent’s performance results and the cause of his injury remain groundless. The Respondent played for the Appellant through injury, treated his injury and kept the Appellant informed of his medical progress. The Respondent was ready to return to play for the Appellant. The Respondent completed his obligations under the Agreement.

Notwithstanding the reasoning above, for the reasons set out in Section II.A above, CAS has no jurisdiction over this case in hand and the BAT award dated 30 January 2013 is final and binding on the parties. Furthermore, even if we hypothetically assume that CAS has jurisdiction over this case, the statute of limitation for the Appellant to appeal before CAS expired as of 20 February 2013, as explained in Section II.B above.

In the light of the above explanations and facts, the Respondent hereby requests the dismissal of Appellant's request for appeal".

- 3.7 On 2 April 2013, the CAS issued an Order on Provisional Measures rejecting the Appellant's application for a stay of the proceedings. Further, the CAS Court Office acknowledged receipt of the Respondent's Answer. As the Respondent filed an objection to the CAS jurisdiction and as the Respondent also considered that the appeal to the CAS was filed late by the Appellant, the CAS Court Office granted the Appellant ten days from receipt of the letter to comment on CAS jurisdiction and the time limit to appeal.
- 3.8 On 23 April 2013, the Appellant filed its submission on jurisdiction and admissibility.
- 3.9 On 26 April 2013, the Respondent provided his comments on the Appellant's submission.
- 3.10 On 30 April 2013, the Appellant objected to the admissibility of the Respondent's comments dated 26 April 2013.
- 3.11 On 13 May 2013, the CAS Court Office issued a notice to the parties that the Panel was constituted in the following composition: Mr Mark Hovell as President, Prof. Dr. Martin Schimke as Arbitrator nominated by the Appellant and Prof. Lucio Colantuoni as Arbitrator nominated by the Respondent.
- 3.12 In accordance with Article R57 of the CAS Code, the Panel determined that there was no need to hold a hearing to adjudicate the issue of jurisdiction, and on 17 June 2013, the CAS Court Office informed the parties that the Respondent's comments of 26 April 2013 were accepted into the CAS file and that both parties had the opportunity to provide final submissions on jurisdiction and, in particular, upon the applicable edition of the FAT Arbitral Rules.
- 3.13 As neither party provided any further submissions by the deadline set by the CAS Court Office, the Panel reviewed the issue of jurisdiction with reference to the papers in the CAS file.

4. THE PARTIES' SUBMISSIONS

- 4.1 The following outline of the parties' positions as they relate to the jurisdiction of CAS is illustrative only and does not necessarily comprise every contention put forward by them. The Panel, indeed, has carefully considered all written submissions made by the parties regarding the jurisdiction of CAS, even if there is no specific reference to those submissions in the following summary.

A. *The Appellant's Submissions*

- 4.2 The Appellant submitted that its right be heard in this present matter arose out of the Contract. Article 14 of the Contract states:

"Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT arbitration rules by a single arbitrator appointed by the FAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' domicile. The language of the arbitration shall be English".

- 4.3 Moreover, the Appellant submitted that at the time of the Contract, the FAT Arbitration Rules (2009 edition) were approved and these provided that *"Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland"*. Furthermore, Article 17 of the FAT Arbitration Rules (2009 edition) provided *"Awards of the FAT can only appeal to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland and any such appeal must be lodged with CAS within 21 days from the communication of the award. The CAS shall decide the appeal ex aequo et bono and in accordance with the Code of Sports-related Arbitration, in particular the Special Provisions Applicable to the Appeal Arbitration Procedure"*.
- 4.4 Therefore, when the Appellant and the Respondent entered into the Contract, they clearly agreed to refer any dispute to the FAT and, at the date of the Contract, the FAT Arbitration Rules (2009 edition) were in force and that version provided that the parties could appeal any decision of the FAT to the CAS. Both parties were aware of this fact and therefore they had agreed to the competence of the FAT with the knowledge that there may be an appeal to the CAS.
- 4.5 In conclusion, this CAS Panel has jurisdiction to adjudicate the Appellant's claims against the Respondent and should hear the case.
- 4.6 In relation to the time limit to appeal, the Appellant submitted that the Decision was notified to the Appellant's attorney on 1 February 2013 by way of email, which stated *"Unfortunately, it appears that you were not copied on the email with which the award was issued due to a clerical mistake"*. On 21 February 2013, the Appellant filed a Statement of Appeal with the CAS pursuant to Article R47 of the CAS Code. In accordance with the CAS Code, the time limit shall commence from the day after that on which notification of the Decision was received. The Appellant submitted that essentially the Decision was received on 1 February 2013 and, as such, the time limit to appeal was to expire on 22 February 2013. Thus, the Appellant filed the Statement of Appeal within the applicable time limit.

B. *The Respondent's Submissions*

- 4.7 The Respondent submitted that the CAS does not have jurisdiction over the case at hand between the Appellant and the Respondent.

- 4.8 Article 3 of the FAT Arbitration Rules (2009 edition) provided an arbitration clause for parties to use should they wish to use it. This clause included a provision that awards of the FAT could be appealed to the CAS. The Appellant and the Respondent included the recommended arbitration clause in the Contract, however they did not include the provision that awards of the FAT could be appealed to the CAS.
- 4.9 In accordance with Article R47 of the CAS Code, an appeal can only be filed with the CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement. There was no agreement between the parties enabling the filing of an appeal against a FAT or BAT award before CAS. Moreover, FIBA Internal Regulations were approved by the FIBA Central Board on 3 September 2010 and were in full force at the time of the execution of the Contract. These Regulations clearly provide that FAT or BAT awards would be final and binding upon communication to the parties.
- 4.10 Furthermore, FIBA General Statutes 2010, which were valid and in effect as of 7 September 2010, clearly state that the awards of the BAT (previously FAT) were final and binding upon communication to the parties.
- 4.11 In light of the above, there was no specific arbitration agreement between the parties, nor a statute or regulation of BAT which enabled an appeal procedure before CAS. Therefore, the CAS has no jurisdiction over this dispute and the Decision is final and binding on the parties.
- 4.12 Notwithstanding the above, should it be deemed that the FAT Arbitration Rules (2009 edition) apply, then the parties' clear written agreement in the Contract and mutual understanding was to preclude any appeal procedure.
- 4.13 In relation to the time limit of the appeal the Respondent submitted that Article R49 of the CAS Code states the time limit for appeal shall be 21 days from the receipt of the appealed decision. The Decision was notified to the parties by email on 30 January 2013 and therefore the Appellant's appeal should have been submitted by 20 February 2013.
- 4.14 The Respondent noted that throughout the BAT proceedings, the primary contact was the Appellant's attorney, Ms Basak Akbas, who was copied in on the email of 30 January 2013 which attached the Decision. Further the Appellant's principals and executives were parties to the email. The fact that one of the Appellant's attorneys was not copied in the email does not result in justifying a delay in the time limit as set forth by the CAS Code.

5. JURISDICTION OF THE CAS

- 5.1 As Switzerland is the seat of the arbitration and all parties involved are non-Swiss entities or persons, the provisions of the Swiss Private International Law Act ("PILA") apply pursuant to its Article 176, paragraph 1. According to Article 186 of the PILA, the CAS has the power to decide on its own jurisdiction.

- 5.2 Furthermore, according to Swiss legal scholars, this provision “*is the embodiment of the widely recognized principle in international arbitration of ‘Kompetenz-Kompetenz’. This principle is also regarded as a corollary to the principle of the autonomy of the arbitration agreement*” (ABDULLA Z., ‘The Arbitration Agreement’, in: KAUFMANN-KOHLER/STUCKI (eds.), *International Arbitration in Switzerland – A Handbook for Practitioners*, The Hague 2004, p. 29).
- 5.3 “*Swiss law gives priority to the arbitral tribunal to decide on its own competence if its competence is contested before it [...]. It is without doubt up to the arbitral tribunal to examine whether the submitted dispute is in its own jurisdiction or in the jurisdiction of the ordinary courts, to decide whether a person called before it is bound or not by the arbitration agreement*” (MÜLLER C., *International Arbitration – A Guide to the Complete Swiss Law*, Zurich et al. 2004, p. 115-116).
- 5.4 Article 186 of the PILA has been held to be applicable in CAS proceedings as well (RIGOZZI A., *L’arbitrage international en matière de sport*, thesis Geneva, Basel 2005, p.524).
- 5.5 Furthermore, neither party has denied that CAS has the competence to rule on its own jurisdiction in the present case. Thus, under principles of Swiss law the Panel has competence to rule on its own jurisdiction.
- 5.6 The parties correctly asserted that Article R47 of the CAS Code is the relevant provision regarding jurisdiction of CAS. Article R47 states that:
“An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body” (emphasis added).
- 5.7 Generally speaking, this Article requires three separate criteria in order for the CAS to have jurisdiction over a claim:
- a) A decision of a federation, association or sports-related body; and
 - b) An express grant of jurisdiction either through:
 - i. The statutes or regulations of that sports-related body; or
 - ii. A specific arbitration agreement concluded by the parties; and
 - c) The Appellant has exhausted all legal remedies available to him prior to the appeal.
- 5.8 It is undisputed among the parties that this Appeal is directed against the Decision which emanates from the BAT, a sports-related body.
- 5.9 Neither party claims that the parties entered into a specific arbitration agreement. Whilst the Appellant makes reference to the FAT Arbitration Rules (2009 edition) which include optional wording to be inserted into arbitration clauses in playing contracts that provides an appeal to the CAS, that wording was not inserted in the Contract. Therefore, the parties disagree over whether or not the relevant statutes or regulations of FAT provide for a right of appeal of such a decision to the CAS.

- 5.10 The Appellant has submitted that at the time of the Contract the FIBA Arbitration Rules (2009 edition) were in force, however the Panel have determined that this was not the case. Further, the Panel note that the Appellant declined to supplement its submissions as to why it thought this edition were in force and applicable. The Panel determine that the FIBA Arbitration Rules (2010 edition) were in force at the time the Contract was entered into and note that these do not provide for an appeal to be made to the CAS, as had been provided for in the 2009 version. Further, the FIBA Internal Regulations were also in force at the time that the parties entered into the Contract and these regulations clearly provide that awards of the BAT (or FAT) shall be final and binding upon communication to the parties.
- 5.11 Finally, the FIBA General Statutes (which came into effect on 7 September 2010) also clearly provide that awards of the BAT (or FAT) are final and binding upon communication to the parties.
- 5.12 In light of the above, it is clear to the Panel that from the various FIBA Regulations and Statutes there is no right of appeal to the CAS. Therefore, CAS has no jurisdiction over this dispute and the Panel need not address the issue of the admissibility of the potentially late Statement of Appeal.

Conclusion

- 5.13 The BAT Award is final and binding on the parties.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. It has no jurisdiction to adjudicate the present dispute between Beşiktaş Jimnastik Kulübü Demeği and Allen Iverson.
 2. The appeal filed by Beşiktaş Jimnastik Kulübü Demeği on 21 February 2013 against the decision of the Basketball Arbitral Tribunal dated 30 January 2013 is dismissed.
- (...)
5. All other motions or prayers for relief are dismissed.