



Arbitration CAS 2017/A/5128 Aliaksandr Khatskevich v. Belarus Football Federation (BFF), award of 14 December 2017

Panel: Mr Clifford Hendel (USA), President; Mr Manfred Peter Nan (The Netherlands); Mr Michele Bernasconi (Switzerland)

Football

Termination of the employment contract of a coach

Jurisdiction of the CAS

Domestic dispute

Need for express and unambiguous submission to CAS jurisdiction

1. In order for the CAS to have jurisdiction to hear an appeal, the statutes or regulations of the sports-related body from whose decision the appeal is being made, must expressly recognize the CAS as an arbitral body of appeal.
2. A dispute between a Belarus national and the Belarus Football Federation, and as such, subject to appeal to the ordinary Belarus courts pursuant to the relevant provisions of the BFF Statutes is a domestic dispute.
3. Neither any of the direct or indirect mentions of CAS in the BFF Statutes, nor the mere submission to the FIFA Statutes (including the reference to Article 59.3 of the FIFA Statutes) and the latter's instruction as to the inclusion of CAS submissions in members' statutes, or any combination of the same, is sufficient to confer jurisdiction on the CAS. To the contrary, submission to CAS jurisdiction must be express and unambiguous.

I. PARTIES

1. Aliaksandr Khatskevich (the "Appellant") is a former Head Coach of the national football team of Belarus. He is of Belarussian nationality.
2. The Belarus Football Federation (the "Respondent" or "BFF") is the governing body for football in the Republic of Belarus, responsible for the development and promotion of football in the Belarus territory, with its registered office in Minsk, Belarus.

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts, as established on the basis of the written submissions of the parties and the evidence examined in the course of the proceedings and

presentations made and discussions had at the hearing. Additional facts may be set out, where relevant, in connection with the legal discussion.

4. On December 5, 2014, the Appellant and the Respondent entered into a contract, valid through November 30, 2017 (the “Contract”), under which the Respondent commissioned the Appellant to serve as Head Coach of the Belarus national football team, in accordance with the terms and conditions of said Contract and the decisions of its Executive Committee.
5. As stipulated in Annex 1 of the Contract, the Appellant would be paid a monthly fee equivalent to USD 32,500, paid in Belarus rubbles at the currency exchange rate of the National Bank of the Republic of Belarus.
6. Annex 2 of the Contract contained certain “competition tasks” or “tournament tasks”, the non-fulfilment of which by the Appellant permitted the early termination of the Contract.
7. The Contract was executed, according to the Appellant in the version submitted with his Appeal Brief, in the Russian language; according to the Respondent (in the version submitted as an annex to its Answer) it was signed in both Russian and English, with both having equal legal force.
8. On December 6, 2016, the Appellant received a notification from the Respondent communicating that due to three “*crucial*” breaches of the Contract by the Appellant – i.e. failing to reside in Belarus for at least 181 days per year, failure to obtain consent of the Respondent before granting a certain interview, and non-achievement of the competition task determined by the Respondent for the autumn part of the qualifying competition for the FIFA World Cup 2018 – the Respondent had determined to unilaterally terminate the Contract with immediate effect.
9. On February 11, 2017, the Appellant appealed the Respondent’s decision to the Football Arbitration Body of the BFF (the “Football Arbitration Body”), arguing that the Contract had been terminated without just cause, and seeking that the Respondent be ordered to pay a compensation of USD 383,700 together with salary for six working days of December that was pending.
10. On April 17, 2017, the Football Arbitration Body decided the following:
 - i. “... To oblige the Association “Belarus Football Federation” pay Khatskevich A.N. the remuneration sum for 6 working days of December 2016 in the amount of 6,288 USD within 30 days from the day of taking the present decision ...
 - ii. To dismiss other claims of Khatskevich A.N.
 - iii. The expenses, related to the present proceedings, shall be imposed on Khatskevich A.N.
 - iv. In accordance with Article 6.24. of the Association “Belarus Football Federation” Statute, the present decision shall be final and not subject to appeal”.

11. Thus, save for the finding in respect of the six days of December salary, the Appellant's claim was rejected by the Football Arbitration Body (albeit the grounds were limited to the first and third of the breaches identified in the December 6, 2016 letter, the Football Arbitration Body having concluded that the purported breach for participating in an unauthorized interview was not established).

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

12. On May 10, 2017, in accordance with Article R48 of the Code of Sports-related Arbitration (2017 edition) (the "CAS Code"), the Appellant filed a statement of appeal before the Court of Arbitration for Sport (the "CAS"), with respect to the decision rendered on April 17, 2017 by the Football Arbitration Body.
13. In the statement of appeal, the Appellant nominated Mr. Manfred Peter Nan as co-arbitrator.
14. On May 22, 2017, in accordance with Article R51 of the CAS Code, the Appellant filed his appeal brief.
15. On May 25, 2017, the Respondent appointed Michele A.R. Bernasconi as co-arbitrator.
16. On June 23, 2017, in accordance with Article R54 of the CAS Code, the Arbitral Panel called upon to resolve the dispute was constituted by:
 - i. President: Mr. Clifford J. Hendel, attorney-at-law in Madrid, Spain;
 - ii. Arbitrators:
 - Mr. Manfred Peter Nan, attorney-at-law in Arnhem, The Netherlands;
 - Mr. Michele A.R. Bernasconi, attorney-at-law in Zurich, Switzerland.
17. On July 13, 2017, in (purported) accordance with Article R55 of the CAS Code, the Respondent submitted to the CAS its answer (with annexes) via e-mail, sending it by courier only on July 21, 2017.
18. On August 1, 2017, the Appellant objected to the admissibility of the Respondent's answer. The Appellant stated that the purported electronic filing violated the provisions of Articles R31, R32 and R55 of the CAS Code and thus the Respondent had failed to submit its answer (and annexes) to the CAS in due form within the established time limit (i.e. the Respondent should have arranged for physical delivery of the answer, or should have sent the response by courier, no later than July 13, 2017).
19. On August 16, 2017, the Respondent acknowledged a "*technical mistake*" in sending the answer (and annexes) by email on the due date, attributing the same to the last-minute finalization of numerous translations from Russian to English (mentioned below), and asked that the Panel accept the documents nonetheless.
20. On August 17, 2017, the Panel declared the Respondent's answer inadmissible under Article R31 of the CAS Code. Nevertheless, the annexes to the answer were admitted in accordance

with Articles R57 and R44.3 of the CAS Code, as appropriate to supplement the Appellant's presentation.

21. In accordance with Article R57 of the CAS Code, the parties would be entitled to make full oral submissions and, in particular, the Respondent would be able to answer orally the Appellant's appeal brief (without prejudice to the right of the Appellant to comment or to any final determination by the Panel as to the admissibility of the Respondent's request for relief as may be submitted on such occasion).
22. On August 30, 2017, the hearing was scheduled by the CAS to be held on October 17, 2017 at the CAS Court Office. The parties were invited to provide the CAS Court Office on or before September 6, 2017 with the names of all the persons attending the hearing, including such witnesses and experts specified in the written submissions as the parties desired to be heard.
23. On August 30, 2017, the Panel issued for signature the Order of Procedure, noting that the Appellant relied on Article 14 of the Statutes of the BFF as conferring jurisdiction on the CAS, that such jurisdiction was contested by the Respondent, that such objection was filed together with the Respondent's answer that had been declared inadmissible and that the Panel expressly reserved the right to decide on the admissibility of the objection in the final award. The Appellant and the Respondent signed and returned the Order of Procedure on September 4 and 5, 2017, respectively.
24. On September 5, 2017, the Appellant's counsel advised that the Appellant would attend the hearing (by Skype) along with (i) witness Eduardo Docampo Aldamo (also by Skype) and (2) counsel Yuliya Morozova and Dmytro Makarov.
25. On September 6, 2017, the BFF indicated that its attendees at the hearing would be: (i) the Respondent's Director for International Legal Affairs, Mr. Sergei Ilyich, (ii) as a witness, Mr. Stanislav Dragun (by Skype), and (iii) as a second witness, Mr. Sergei Safaryan.
26. On September 7, 2017, the CAS Court Office advised the parties that since the Respondent's answer had been deemed inadmissible, it was in principle not allowed to bring witnesses to be heard at the hearing absent the Appellant's consent.
27. On September 8, 2017, the Appellant indicated that he did not consent to the Respondent's bringing witnesses to the hearing.
28. On October 17, 2017, a hearing was held at the CAS Court Office in Lausanne, Switzerland. In attendance at the hearing were:
 - For the Appellant: Ms. Morozova and Mr. Makarov
 - For the Respondent: Mr. Ilyich
 - The three members of the Panel, as well as Mr. William Sternheimer, CAS Deputy Secretary General.
29. At the hearing, the parties were heard (through counsel) as to the jurisdictional issue, on the basis of which (for the reasons set out below) the Panel determined that for reasons of

economies of time and cost, it would not be appropriate to proceed to hear the contemplated witnesses or argument of counsel as to the merits.

30. At the opening of the hearing, the parties confirmed that they had no objections with respect to the constitution of the Panel; at the close, they confirmed satisfaction with the manner in which their due process rights were respected throughout the proceedings.

IV. REGARDING TRANSLATIONS

31. As a preliminary matter, the Panel took note at the hearing that among the numerous certified translations to English of various Russian-language documents submitted by the Respondent and admitted by the Panel, several had also been submitted by the Appellant with his statement of appeal and appeal brief, and there appeared to be at least some (not necessarily material) discrepancies between the competing translated versions.
32. Accordingly, the Panel determined that it would accept as valid and reliable the certified translations submitted by the Respondent, unless the Appellant were to raise any issue involving a relevant difference or discrepancy between any of those translations and those submitted by the Appellant in uncertified form.
33. No such issue was raised.

V. POSITION OF THE PARTIES WITH REGARD TO JURISDICTION

A. The Appellant's position

34. The arguments of the Appellant may be summarised as follows:
35. The Appellant bases his assertion of CAS jurisdiction, as it must, on Article R47 of the CAS Code, which provides as follows:

“An appeal against the decision of a federation, association or sports related body may be filed against the CAS if the statutes or regulations of said body so provide or if the parties have concluded a specific arbitration agreement and if Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body”.

36. In his appeal brief, the Appellant argues first, that the parties' agreement in Article 4.6 of the Contract is sufficient to constitute a “*specific arbitration agreement*” upon which CAS jurisdiction can properly be grounded.
37. Article 4.6 of the Contract (in the certified translation provided by the Respondent and not objected to by the Appellant) provides that *“In other words, [that] the parties to the Contract agreed that all disputes between them, arising under the Contract, shall be settled under the ABFF Charter and regulations, as well as under the FIFA and UEFA Charter and regulations, with initially filing a claim to the ABFF Football Arbitration Body as first instance”.*

38. The Appellant further argues that various direct or indirect mentions of the CAS and appeals to the CAS contained in the BFF and FIFA Statutes constitute sufficient provision for it to be understood that the April 7, 2017, decision of the Football Arbitral Body can properly be appealed to the CAS on the basis that the BFF Statutes sufficiently contemplate such possibility.
39. In particular, the Appellant cites Articles 14.5 and 14.6 of the BFF Statutes, which provide (again, in the Respondent's certified translation, acknowledged by the Appellant as accurate at the hearing) as follows:
- "14.5 The Members of the ABFF may not appeal to civil courts of general jurisdiction for any dispute arising with the Association, with FIFA and UEFA, and also should any similar disputes arise with other football Associations, both international and national, with football clubs and other members of the football community.*
- 14.6 The Members of the Association are obliged to settle each of the potential disputes pursuant to the rules established by the Statutes of ABFF, UEFA and FIFA and to submit any such dispute to the competent bodies of these organizations or to the Court of Arbitration for Sport (CAS) with headquarters in Lausanne, Switzerland if the dispute is international"* [the last five words of this provision were substituted by an ellipsis (i.e. "...") in the relevant portion of the appeal brief].
40. The Appellant further makes reference to Article 59.3 of the FIFA Statutes, imposing an obligation on FIFA member associations (including the BFF) to insert a clause in their statutes precluding recourse to ordinary courts and providing instead for recourse to independent and duly constituted arbitral tribunals or the CAS.
41. At the hearing, the Appellant reaffirmed his position on jurisdiction as that set out in his appeal brief and indicated as a subsidiary argument (citing CAS 2015/A/4254) that the Respondent's objection was untimely raised and should accordingly be deemed waived.
42. The Appellant accordingly concludes that the CAS has jurisdiction to hear this appeal.

B. The Respondent's position

43. The arguments of the Respondent may be summarised as follows:
44. The Respondent dismisses the Appellant's affirmation that the Contract includes a specific agreement to submit appeals of BFF decisions to the CAS, affirming in respect of the Contract's arbitration clause (Article 4.6, set out above), that it is not a proper agreement between the parties to the dispute relating to its referral to CAS, and in respect of Article 14.6 (also set out above) that the present case is purely national in nature, involving a Contract concluded in Minsk and signed between residents of Belarus.
45. The Respondent also cites Article 4.3.2 of the BFF Statutes, providing that Members are obliged:

“... to envisage in contracts with players, officials and licensed match agents and players agents a clause, which stipulates that any contractual disputes of a domestic nature shall be submitted to the Players Status and Transfer Committee (first instance body), further to the Arbitration Body (second instance body), or on the agreement of the parts to the CAS in Minsk and in case of national nature of the dispute decisions of the Football Arbitration of the CAS in Minsk are final and binding for the parties, in case of international dispute the parties are entitled to apply for the decision to the bodies defined by FIFA in line with FIFA Statutes”.

46. The Respondent made reference at the hearing to a series of CAS cases in which the regulation of various national federations expressly contemplated that final decisions of these federations as to internal or national disputes could be brought to the CAS, distinguishing those express provisions for CAS jurisdiction from the provisions in the BFF Statutes, which contain no such express conferral of jurisdiction for disputes other than those of an international character.
47. Thus, the Respondent affirms that the Contract reflects no specific agreement providing for CAS jurisdiction.
48. Similarly, and again citing consolidated CAS jurisprudence to the effect that the indication in the FIFA Statutes recognizing the CAS and instructing or obliging member federations to include CAS arbitration in their statutes is not sufficient (save in doping matters, where the FIFA Statutes expressly contemplate CAS appeals of internal doping-related decisions) to confer by itself jurisdiction on the CAS.
49. The Respondent concludes that the CAS is without jurisdiction to hear this case, and should accordingly dismiss the appeal.

VI. ANALYSIS OF THE PANEL

50. The Respondent objected to the CAS jurisdiction in the hearing. The Appellant argued that the fact that the Respondent's answer was considered inadmissible should preclude the Respondent from objecting to CAS jurisdiction, citing CAS 2015/A/4254.
51. Nevertheless, the Panel finds that the cited CAS case does not support the Appellant's position. In the mentioned case the parties had entered into discussion of the merits of the case and only at a later stage (after having submitted its answer and two days before the hearing) was the alleged lack of jurisdiction raised.
52. Moreover, in the Panel's letter of August 17, 2017, it was specifically stated that the objection on jurisdiction could be addressed in the oral presentations at the hearing, where its admissibility would be decided.
53. Therefore, the Panel concludes that the Respondent has – consistent both with CAS jurisprudence and similar jurisprudence of the Swiss Federal Tribunal, e.g. SFT 4P.105/2006 – correctly and timely objected to the CAS jurisdiction, and its right to object cannot be considered to have been waived.

54. The Swiss Federal Code on Private International Law (the “PIL” Code) (Article 176.1) applies to arbitrations that have Switzerland as seat and at least one of the parties does not reside in or did not have an address in Switzerland when the arbitration agreement was made. Since the seat of the arbitration is Lausanne, Switzerland (Article R28 of the CAS Code) and neither of the parties is resident of Switzerland, article 176 et seq. of the PIL apply.
55. Further, according to Article 186.1 of the PIL, the Panel may decide on its own jurisdiction, so long as any objections to jurisdiction are made before the merits of case are addressed. As noted, the Panel is satisfied that this condition has been met in this case.
56. The Panel observes that pursuant to Article R47 of the CAS Code, for CAS to have jurisdiction in a matter requires that either the parties have expressly agreed it or that the statutes or regulations of the body issuing the decision provide for an appeal before CAS.
57. CAS jurisprudence has repeatedly confirmed this position; see with regard to the latter criterion the award on jurisdiction rendered in the case CAS 2005/A/952: *“In order for the CAS to have jurisdiction to hear an appeal, the statutes or regulations of the sports-related body from whose decision the appeal is being made, must expressly recognize the CAS as an arbitral Body of appeal” ... “In the present case, the statutes or regulations of the relevant body – the FAPL – do not contain any reference to a right of appeal to the CAS. In fact, FAPL rule R63 states that the decision of an appeal board shall be final. The CAS therefore has no jurisdiction to hear an appeal from a decision of the FAPLAC, on the basis of the statutes or regulations of the FAPL”.*
58. The Panel accordingly has to consider whether either of the two criteria is satisfied in this instance.
59. The Panel cannot accept the Appellant’s argument that the Contract contains a specific arbitration agreement sufficient to confer jurisdiction on the CAS. In fact, Article 4.6 of the Contract only refers to the initial filing of a claim to the Football Arbitration Body as first instance.
60. During the hearing, the question of the nature of the dispute was raised, the Appellant noting that the question of whether the dispute is domestic or international was an *“open question”*.
61. The Panel is not convinced; indeed, it would seem clear that this in fact is a domestic dispute between the Appellant, being a Belarus national and the Respondent, being the Belarus Football Federation, and as such, subject to appeal to the ordinary Belarus courts pursuant to the relevant provisions of the BFF Statutes (set out above), and as further exemplified in the Respondent’s exhibit 22, a 2015 decision, not mentioned by the Appellant, of a Minsk court in which the case of a claim for unfair dismissal filed by the Appellant’s predecessor as national team head coach was heard (but rejected on the merits) by a Minsk court.
62. The Panel similarly cannot accept the Appellant’s suggestions that either any of the direct or indirect mentions of CAS in the BFF Statutes, or the mere submission to the FIFA Statutes (including the reference to Article 59.3 of the FIFA Statutes) and the latter’s instruction as to

the inclusion of CAS submissions in members' statutes, or any combination of the same, is sufficient to confer jurisdiction on the CAS.

63. To the contrary, well-established (and well-conceived) CAS jurisprudence (e.g. CAS 2005/A/952, referring to appellate jurisdiction under Article R47 of the CAS Code, as here) establishes that submission to CAS jurisdiction must be express and unambiguous.

VII. CONCLUSION

64. The Panel accordingly finds that it is without jurisdiction to hear the present case, and the appeal must be dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The CAS lacks jurisdiction to hear Aliaksandr Khatskevich's appeal of the April 17, 2017, decision of the Belarus Football Federation.
2. (...).
3. (...).