



Arbitration CAS 2017/A/5072 Shanxi Fenjiu Basketball Club v. Jeffrey Curtis Ayres, award of 28 November 2017

Panel: Mr Murray Rosen QC (United Kingdom), President; Prof. Matthew Mitten (USA); Mr Chi Liu (China)

Basketball

CAS jurisdiction

Finality of BAT awards absent specific agreement

Necessity of filing by courier under Article R31 CAS Code

- 1. In case a contract between a club and a player incorporates the rules of the Basketball Arbitral Tribunal (BAT), which provide that awards of the BAT are final and binding, and in the absence of any specific agreement between the parties to foresee CAS jurisdiction, the CAS does not have jurisdiction.**
- 2. Pursuant to Article R31 CAS Code, the filing of the appellant’s statement of appeal by email within the 21-day deadline of Article R49 CAS Code is only valid if a courier-delivered copy of the statement of appeal is also filed to the CAS Court Office within one subsequent business day following the deadline.**

I. PARTIES

- Shanxi Fenjiu Basketball Club (in English, “Shanxi Brave Dragons” - “the Club”) is a basketball club participating in the North Division of the Chinese Basketball Association (“CBA”) which is affiliated to the Fédération Internationale de Basketball (“FIBA”).
- The Respondent Jeffrey Curtis Ayres (“the Player”) is an American professional basketball player with a career at various clubs both in the USA and elsewhere, and which included the Club in September and October 2015.

II. FACTUAL BACKGROUND

- The following summary of the facts giving rise to the present matter, based on the parties’ submissions, is intended as background to the Panel’s reasoning below. Additional facts may be referred to, where relevant, in connection with the legal discussion below. The Panel has considered all the allegations and arguments submitted by the parties.
- On 7 August 2015, the Club and the Payer executed a Player Employment Agreement for the

2015-16 basketball season (“the Contract”) setting out their respective rights and obligations, and constituting under Article 9 the entire agreement between them.

5. The Contract had been negotiated on behalf of the Player by Mr Matthew Beyer. It was in both English and Chinese but in both languages specified explicitly: (a) in Article 7, that *“In the case of any controversy or dispute the English form of this agreement shall be the governing language of this agreement”*; and (b) in Article 9, that *“the express terms of the Contract constitute the parties’ entire agreement, regardless of any prior negotiations and other agreements not pertinent to this dispute”*.
6. The English version of Article 11 of the Contract read *“... [a]ny dispute arising from or related to the present contract shall be submitted to the BAT”, that is the Basketball Arbitral Tribunal*) and did not provide for an appeal from the BAT Award to the Court of Arbitration for Sport (“CAS”).
7. However, according to the Club, the Chinese version of Article 11 read (in the English translation which it provided):

“Any dispute arising out of or in connection with this Contract shall eventually be submitted to the Basketball Arbitration Tribunal, headquartered in Geneva, Switzerland, and the sole arbitrator appointed by the Chairman of the Arbitration, in accordance with the Arbitration Rules, Article 12 of the Swiss Treaty, which does not take into account the principle of territoriality, the final ruling language is English. The Court of Arbitration for Sport shall accept the appeal and fair mediation”.
8. The Player attended upon the Club from 17 September 2015 but a number of disputes arose between them as regards his training, medical condition and otherwise; try-outs at other clubs did not resolve matters; and on 21 October 2015 the Club purported to terminate the Contract for cause and ceased to make payment to him of salary and expenses.
9. In accordance with Article 11 of the Contract, the Player submitted a claim on 25 March 2016 to the BAT (BAT 0824/16) constituted under the aegis of FIBA, and Mr Klaus Reichert SC was appointed as arbitrator.
10. Following a number of submissions and applications, a hearing took place on 26 August 2016 at which (among other things) 3 witnesses gave testimony for the Player and 4 witnesses for the Club.
11. Subsequent to post-hearing submissions, Mr Reichert issued a 32-page award dated 21 February 2017 (“the BAT Award”) notified to the parties on the same date, deciding that the Club should pay the Player: (1) USD 770,000 by way of compensation for unpaid salary, plus interest; (2) USD 9,500 by way of compensation for unpaid compensation for incurred expenses, plus interest; (3) USD 14,2000 by way of late payment penalties; (4) EUR 16,500.34 as reimbursement of his arbitration costs; and (5) EUR 40,000 as a contribution to his legal fees and expenses.

III. THE PROCEEDINGS BEFORE CAS

12. On 13 March 2017, the Club filed with CAS by email a statement of appeal against the BAT

Award under Articles R48 and R51 of the Code of Sports-related Arbitration (2017 edition, the “Code”).

13. The Club subsequently (on 23 March 2017) filed by courier delivery to the CAS Court Office its statement of claim, appeal brief and other documents, requesting that the BAT Award be invalidated and “... *for Appeal to your Court to make a fair award*”.
14. On 29 March 2017, the CAS Court Office invited the Appellant to complete its appeal with (i) a copy of the decision appealed against and (ii) copy of the provisions of the statutes, regulations or the specific agreement providing for appeal to CAS.
15. In such letter it was expressly stated that “*the present letter is sent without prejudice to the time-limit stipulated by the joint reading of Articles R49 and R32 of the Code for the filing of the statement of appeal and to the time-limit stipulated by the joint reading of Article R51 and R32 of the Code for the filing of the appeal brief. In view of the foregoing, **this letter shall by no means be understood** as a reinstatement in the relevant time limits, if not complied with, or as a ratification of a possible late filing of the above-mentioned briefs*” (emphasis in original).
16. On 31 March 2017, the Club sent a letter to the CAS Court Office stating, *inter alia*, that “*we have received the original [BAT Award] on Mar 13th 2017. As a result, we shall calculate the appealing time limit from Mar 13th 2017 ...*”.
17. On 1 April 2017, the Club completed its appeal.
18. On 2 May 2017, the Player served his answer in accordance with Article R55 of the Code, asserting that “*CAS lacks jurisdiction to review the BAT Award*” which issue of jurisdiction he sought to have determined as a preliminary issue.
19. On 18 May 2017, the CAS Court Office notified the parties of the appointment of the Panel pursuant to Article R54 of the Code.
20. By letter dated 31 May 2017, the CAS Court Office notified the parties that the Panel had decided to bifurcate the proceedings to decide jurisdiction/admissibility as a threshold matter under Article R55, para. 5, of the Code and gave directions as to further submissions regarding this issue.
21. In accordance with the Panel’s directions, the Club made its submissions on jurisdiction on 19 June 2017 and the Player served further submissions on that issue on 29 June 2017.
22. On 13 July 2017, the Player informed the CAS Court Office of his preference for an award to be issued on the sole basis of the parties’ written submissions.
23. On 18 July 2017, the Club requested a hearing on the issue of jurisdiction.
24. On 25 July 2017, after consulting with the parties and fully considering their respective written submissions (and documents including the Contract, FIBA regulations, and BAT Arbitration Rules), the Panel decided that it was sufficiently well informed to decide the issue of jurisdiction

without a hearing and that “*witness statement (if any) filed by the parties will not be considered by the Panel when deciding on jurisdiction as a threshold matter*”.

25. The Panel so decided because:
 - (a) witness evidence (as to the subjective understanding and intent of the parties or otherwise) would be irrelevant and unnecessary; and
 - (b) the further delay and cost of a hearing would be contrary to the fair, expeditious and efficient conduct of the proceedings.
26. On 27 July 2017, the Club protested against the Panel’s decision not to hold a hearing, alleging that such decision would entail a breach of the Club’s right to be heard.
27. On 28 July 2017, the CAS Court Office informed the parties that, despite the Club’s protest, the Panel confirmed its decision not to hold a hearing, because the rights of the parties to be heard and treated equally on the issue of jurisdiction would be fully respected without a hearing.
28. The CAS Court Office issued an Order of Procedure on 10 August 2017, which recorded among other things the (English) language applicable to and steps taken in these proceedings.
29. On 11 August 2017, the Respondent returned a copy of the Order of Procedure duly signed.
30. On 14 August 2017, the Appellant informed the CAS Court Office as follows: “*We have studied the Order of Procedure and have to inform you that we are not able to sign it. The reason is point 9 of the Order of Procedure. As you are well aware, we have always opted to hold a hearing and we have also protested against the decision of the Panel to not hold a hearing (...). We have not changed our position and do maintain our protest and are therefore not in a position to sign the Order of Procedure with its point 9 (...) in the present form*”.
31. On 12 September 2017, the CAS Court Office informed the Appellant “*that its signature of the Order of Procedure will not be understood by the Panel as an agreement with the latter’s decision not to hold a hearing and the Panel will consider that the Appellant’s objection on such decision and its allegations on the right to be heard are maintained*” and requested the Appellant to sign and return a copy of the Order of Procedure.
32. On 14 September 2017, the Appellant returned a copy of the Order of Procedure signed with reservations.

IV. THE PARTIES’ SUBMISSIONS

33. The Panel has carefully and fully considered all of the parties’ written submissions and relevant documents regarding its jurisdiction, and the essence of their respective positions regarding this threshold issue of jurisdiction is summarized as follows.

A. The Club

34. The Club submitted, among other things, that, for the purposes of Article R47 of the Code, the CAS has jurisdiction over this appeal under Article 11 in the Chinese version of the Contract.

35. In support of this contention on the question of jurisdiction, the Club relied on Swiss law as to contractual interpretation (specifically, a Federal Supreme Court decision, ATF 138 III 29) and submitted that:

- (i) Mr Beyer and the Club negotiated, drafted, and commented on the proposed Contract (including Article 11) entirely in Chinese (in particular, Mr Beyer's email in Chinese of 31 July 2015 to the Club's representative included Article 11 as one of its terms);
- (ii) similar Chinese language provisions conferring CAS jurisdiction in an arbitration provision are in the Appendix of the Contract regarding Representative Fees as well as in 30 September 2015 and 5 October 2015 Tryout Permission Agreements between the Club and Player providing that "*An appeal against the award of the Basketball Appeal Tribunal may be filed with the Court of Arbitration for Sport in Lausanne, Switzerland. The Court of Arbitration for Sport shall accept the appeal and mediation*";
- (iii) the objective common intent of the parties and the principle of good faith, given their cultural differences, required that the Club be permitted to appeal the BAT Award to the CAS; and
- (iv) a reasonable person would consider that the Chinese version of Article 11 should prevail over the English version and to prevent any appeal to the CAS would be against the interests of justice.

36. In view of the foregoing, the Club requested the CAS:

1. *To admit its jurisdiction over the case CAS 2017/A/5072;*
2. *To admit the Appellant's appeal, annul the BAT arbitral award dated 21 February 2017 (BAT 0824/16) and dismiss the claim of the Respondent;*
3. *To order the Respondent to pay the costs that the Appellant has incurred in this appeal procedure*".

B. The Player

37. The Player submitted as regards jurisdiction, in summary and among other things, that:

- (i) neither the FIBA nor the BAT statutes nor the Contract in its prevailing and complete English version conferred any jurisdiction on CAS to entertain an appeal against or otherwise review the BAT Award; and
- (ii) the negotiations in Chinese with his agent did not give rise to any agreement or common intention to treat the Chinese version of the Contract as prevailing or thereby confer

jurisdiction on CAS to entertain an appeal, contrary to the clear express terms of the Contract.

38. In view of the above, the Player requested the CAS as follows:

“(...) to dismiss these proceedings for lack of jurisdiction. (...) CAS should order the Club to bear the costs of these proceedings and compensate Mr. Ayres for his legal fees and all other expenses he incurs in these proceedings, pursuant to Procedural Rules R64.1 and 64.5. Finally, Mr. Ayres requests sanctions against the Club to the full extent CAS permits”.

V. APPLICABLE LAW

39. Regarding the applicable law, Article R58 of the Code states:

“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

40. In this case the applicable regulations are those of FIBA and the BAT. The Contract contains no express choice of law, but Article 11 requires the submission of all disputes to the BAT whose seat of arbitration is Geneva, Switzerland, which is also the place of FIBA’s domicile. Therefore, the application of Swiss law is appropriate if and so far as also necessary to determine the Panel’s jurisdiction.

VI. JURISDICTION

41. Article R47 of the Code states:

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

42. In the present case, there are no statutes or regulations conferring jurisdiction upon CAS. Rule 16.5 of the BAT Arbitration Rules and Article 3-290 of FIBA’s International Regulations both provide that BAT awards are “final and binding upon communication to the parties”, and neither provides for CAS or any other arbitral jurisdiction over an appeal of a BAT award.
43. The Club contends that the Chinese version of Article 11 of the Contract provides for the “CAS to accept” an appeal of the BAT Award by either of the parties. However, the English version of Article 11 of the Contract states simply that *“Any dispute arising from or related to the present contract ... shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President”.*

44. The Club's contention is contrary to the BAT Arbitration Rules (as well as FIBA's International Regulations), which do not allow for such an appeal.
45. Moreover, Article 7 of the Contract provides, both in the English and the Chinese versions, that *"In the case of any controversy or dispute the English form of this agreement shall be the governing language of the agreement"*. The English version of Article 11 does not provide for CAS to *"accept the appeal"*. On the contrary, it incorporates the BAT Rules, which provide that BAT awards are *"final and binding upon communication to the parties"* without mentioning CAS or any tribunal other than the BAT.
46. Given the express language of Article 7 of the Contract, it is irrelevant whether (as the Club submits) negotiations for the Contract with Mr Beyer (the Player's agent) were conducted in Chinese and the Club failed to review the English version before signature, or whether the Player (as he submits) had no understanding of Chinese.
47. The Club's reliance on references to CAS in the Appendix to the Contract regarding Representative Fees and in two subsequent Try-out Permission Agreements is also misconceived. The Appendix did not directly involve the Player and the try-out agreements had a different subject-matter that did not vary the Contract (in its prevailing English version).
48. The Club requests that the Panel rely on the Swiss "principle of trust" and rules of good faith articulated in ATF 138 III 29, which are applicable in the event of uncertainty about the mutual intent of the parties, to determine they intended the BAT Award to be appealable.
49. However, in this case there is no uncertainty because the clear and express language of Article 11 of the Contract, which incorporates the BAT Rules, objectively manifests the parties' common intention that the BAT Award is final and binding and cannot be appealed by either party to the CAS. No contrary conclusion would be permissible under these principles of Swiss law.
50. The Club's stated inference that the Player chose not to mention the discrepancy between the English and Chinese versions of Article 11 "in order to mislead" it, is immaterial even if correct because (a) Article 7 states that the English version prevails; and (b) the Club does not contend that the Player did anything to preclude it from having a person fluent in both Chinese and English to review the Contract prior to signing it.
51. Furthermore, there is no dispute that Article 11 required the dispute to be submitted to the BAT, and it appears that the Club fully participated in the BAT proceedings. The BAT Rules and Award do not provide that it may be appealed to the CAS.
52. Whilst the Club contends that it is "in best interest of both parties and in the interest of justice" to allow CAS to review the BAT Award, the interests of justice absolutely require the opposite. The interests of justice require that the Club honour its agreement under the Contract, which incorporate the BAT Rules providing that the BAT Award is final and binding, by fully and promptly complying with its obligations thereunder.

53. The Club's submission that a right to appeal the BAT Award was necessarily entailed in the circumstances is also directly contrary to FIBA's current regulations, which do not allow for any appeal from the BAT and which the parties chose in the Contract as the final and binding means of resolution of their dispute in this case as well as the proper regulation and resolution of its dispute with the Club.
54. It is not necessary to decide whether an agreement between the parties that provides for an appeal to CAS would provide a valid basis for jurisdiction notwithstanding the current FIBA regulations and BAT Rules, which provide that a BAT Award is final and binding, because (as the Panel finds) there was no such agreement in the present case.
55. The Panel therefore merely notes that:
- (a) Article 9.5 of the FIBA General Statutes includes provision for national members to "*promote recourse to and recognise decisions of the Court of Arbitration for Sport and the awards of the Basketball Arbitral Tribunal and ensure that the said decisions and awards are legally binding and enforced ...*"; and
 - (b) in two previous cases (CAS 2014/A/3524, cf. paras 56-58 and CAS 2015/A/4288, cf. paras 67-72), CAS has accepted jurisdiction in respect of an appeal from the BAT on the basis that the parties had agreed to such an appeal.

VII. ADMISSIBILITY

56. Article R49 of the Code provides in part:
- "In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from receipt of the decision appealed against ..."*
57. Article R31 of the Code provides in part that "*... the statement of appeal ... must be filed by courier delivery to the CAS Court Office ... if they are transmitted in advance by ... electronic mail ... the filing is valid upon receipt of the ... electronic mail by the CAS Court Office provided that the written submission and its copies are also filed by courier within the first subsequent business day of the relevant time limit ...*".
58. As already determined by the Panel, the BAT Award was final and binding under both the foregoing BAT Rules and FIBA Regulations, which do not provide for any appeal to CAS, and the parties did not otherwise agree to CAS jurisdiction. Therefore, there was no different or longer time limit for the Club's appeal under such rules and regulations, and the 21-day filing deadline in R49 of the Code applies.
59. Thus, even if CAS had jurisdiction (which the Panel has found it does not), the Club's appeal would be inadmissible because it was not properly filed with CAS in time, as required by Articles R31, R49 and R51 of the Code (see paras. 12-13 above).
60. Pursuant to Article R31 of the Code, the filing of the Appellant's statement of appeal by its

email of 13 March 2017 is only valid and within Article R49's 21-day deadline if a courier-delivered copy is also filed to the CAS Court Office within one subsequent business day following the deadline. In this case, the Appellant did not submit a copy of its statement of appeal by courier until 23 March 2017, which was 30 days after the BAT decision of 21 February 2017 sought to be appealed and 7 business days after the 21-day deadline. Accordingly, the Appellant's statement of appeal was well out of time under the clear provisions of the Code.

61. Further in this regard, the Panel has considered the Appellant's statement that "*we have received the original [BAT Award] on Mar 13th 2017. As a result, we shall calculate the appealing time limit from Mar 13th 2017 ...*" (see para. 16 above). It holds that this contention does not establish that the Appellant's statement of appeal was valid and timely because: (i) in the absence of any specific provision in the relevant regulations or (in the present case) in the Contract, Article R49 does not require that the appealed decision be notified in original for the time limit to file an appeal to start, but only makes reference to the "receipt" of the decision appealed against; and (ii) the Appellant acknowledged at page 3 of its appeal brief that "*the Club received the BAT ... arbitral award ... on February 21st, 2017 ...*".
62. In consideration of the above findings on the lack of jurisdiction, moreover, there is no need for the Panel to address the admissibility and/or the merits of the Player's request for relief that sanctions be imposed "*against the Club to the full extent CAS permits*".

VIII. MERITS

63. In the light of the Panel's determination that it has no jurisdiction and the Club's appeal would be, in any case, inadmissible, it is unnecessary and would be inappropriate for this Award to comment on the merits of the BAT Award and the parties' submissions in respect thereof.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Court of Arbitration for Sport does not have jurisdiction in the matter of this dispute between Shanxi Fenjiu Basketball Club and Jeffrey Curtis Ayres and/or to consider the appeal filed by Shanxi Fenjiu Basketball Club against the BAT Award 0824/16 dated 21 February 2017.

(...)
4. Any other and further prayers or requests for relief are dismissed.