Arbitration CAS 2015/A/4280 Budapest Honvéd FC v. Kain Kandia Emile Traoré, award of 11 July 2016

Panel: Mr Alexander McLin (Switzerland), Sole Arbitrator

Football
Termination of a contract of employment without just cause
Failure of a party to raise a challenge before the FIFA DRC with respect to its jurisdiction
Principle of favorem validitatis and arbitration agreement in favor of the CAS
Agreement to bring the case to the CAS and choice of the applicable law to the merits of the dispute
Termination of a contract of employment by the club due to the poor performance of the player
Purpose of the FIFA RSTP and freedom of national federations to contract and agree their own rules

1. **A party that failed to raise a challenge before the FIFA Dispute Resolution Chamber (DRC) with respect to its jurisdiction is deemed to have waived any jurisdictional objection further to established CAS and Swiss Federal Court case law. Indeed, the lack of any plea of lack of jurisdiction before the DRC would likely have been sufficient to confer jurisdiction on the DRC absent a specific agreement altogether.**

2. **The fact that the parties have chosen a combination of rules of law does not invalidate the agreement to arbitrate, which need only conform with Swiss law further to the conflict of laws rule *in favorem validitatis* established by Article 178 para. 2 of the Swiss Private International Law Act. The manner in which a combination of rules of law and regulations should be applied in the context of a given dispute has been the subject of numerous CAS cases.**

3. **Following agreement on CAS as the court of arbitration, Article 58 of the CAS Code, implicitly agreed to by the parties, takes precedence over any explicit choice of law by the parties, since the purpose of Art. 58 of the CAS Code is to restrict the autonomy of the parties. This Article provides for a mandatory hierarchy of the applicable legal framework, which the parties cannot change. Consequently the parties are entitled to choose the applicable law within the limits of Art. R58 of the CAS Code. Therefore, the parties can only determine the subsidiarily applicable law. Under Art. 58 of the CAS Code, the *"applicable regulations"* always primarily apply, regardless of the will of the parties.**

4. **Under Article 14 of the FIFA Regulations on the Status and Transfer of Players (RSTP), an employment contract between player and club may only be validly terminated without compensation where there is just cause, and there is no room for conflicting or diverging provision agreed directly between the parties. A player's performance (or lack thereof) cannot constitute just cause *ipso facto*, and termination of an employment contract on the basis of insufficient performance must be regarded as a termination**

without just cause. Whether a player did not raise any objections upon review of the agreement to terminate the contract based on such ground, is not relevant to the outcome.

5. The RSTP serve *inter alia* the purpose of creating *"a standard set of rules to which all the actors within the football community are subject to and can rely on"*. As private actors, a national club and a national football federation are free to contract and agree to rules governing their entities that are compatible with global standards and are applied within international private law norms.

I. PARTIES

1. Budapest Honvéd FC ("Honvéd", the "Club", or the "Appellant"), having its principal place of business at Puskás Ferenc u. 1-3, 1194 Budapest, is a Hungarian football club affiliated with the Hungarian Football Federation, itself a member of FIFA (Fédération Internationale de Football Association, the international governing body for the sport of football).

2. Mr. Kain Kandia Emile Traoré, (the "Player" or the "Respondent") is a professional football player of French and Ivorian nationalities, domiciled in Saint Denis, France.

II. FACTUAL BACKGROUND

3. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced. Additional facts and allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

4. In June 2014, the parties entered into an employment contract under which the Respondent agreed to play for the Appellant, and the Appellant agreed to employ the Respondent from 30 June 2014 through 30 June 2016 (the "Agreement").

5. The Agreement was executed in the Hungarian and English languages. Its provisions relevant to the case at hand are set out below:

"…

II. ALLOWANCES

*The Employer is required to pay HUF 1,082.000,- **gross** monthly wages to Employee from July 1, 2014 to June 30, 2016. …*

III. DURATION OF THE CONTRACT

This contract is made between the Parties for a definite duration, from ***July 1, 2014 to June 30, 2016****. …*

V. CEASE AND TERMINATION OF THE CONTRACT

1. Present contract ceases at expiration of the date fixed at point III.

2. The Employer is entitled to terminate by immediate effect the present contract, if the Employee gravely breaches his obligations stated under point IV. 2., with special regard to any breach or non-performance of his obligations stated under points a,b,c,g,m,n,o,p of point IV.2. …

6. The Contracting parties agree that the professional body including persons listed herein shall assess the Employee's performance within 15 days following the last league round of Autumn or Spring considering the fulfillment of requirements included in the present contract, the human and sportsman's attitude and professional criteria. The members of the body: the current majority owner's representative, the current main coach and the current International Director or Club Director. This body makes decision by oral majority. This body may assess the Employee's performance. If the Employee receives from this body an assessment of inadequate performance for the semi-season assessed (Autumn or Spring rounds), than the Employer may use his right of notice of termination within 15 days after reception of such assessment with 30 days notice in connection with the present contract. By signing this contract Employee fully accepts this possibility of termination by the Employer.

VI. MISCELLANEOUS

1. … The Parties agree that if any part of this agreement is invalid it shall not affect the remainder of the entire contract that they accept as binding.

2. Parties understand that the present contract was made in Hungarian and English languages and 4 counterparts of the contract shall be sent to Employer to the Hungarian Football Federation. Parties agree that if a dispute should arise between them related to the contract, the contract in Hungarian language will be authoritative. If any dispute should arise between them related to the present contract, they shall try to settle amicably by talks, but if this is not possible they will turn to the Hungarian Court and Hungarian laws shall apply.
Since Employer and Employee communicate with each other in English Employer declares that all the rules and regulations were made available and explained to Employee. Employee declares that he fully studied and accepted the above mentioned rules and regulations. The present contract might be modified or only by written agreement of the parties (sic). *…*

4. By signing this contract Parties accept the regulations of the FIFA, UEFA, Hungarian Football Federation, the Hungarian Labor Code and the Hungarian Sport Law Code as binding upon them".

6. Neither Hungarian nor English are the Player's native language. Appellant contends that the contract was established by the *"common will of the parties"*. The Player was not represented by an agent at the time of contracting and contends that Employer's representative told him that the contract was *"standard"*, and that since he had no reason to mistrust Honvéd at the time, he signed the contract as-was.

7. On 2 December 2014, following an evaluation by the group of individuals identified in clause V.6 of the Agreement, the Agreement was unilaterally terminated by the Appellant on the basis of the Player's *"inadequate performance"*. He was promptly asked to vacate his lodgings. Transport back home (whether to France or the Ivory Coast) was not provided.

8. Respondent filed a compensation claim before FIFA on 20 February 2015, seeking EUR 48,000 in salary for the remainder of the contractual term, as well as EUR 1,800 in travel expenses to return to the Ivory Coast.

9. The FIFA Dispute Resolution Chamber ("DRC") concluded that there was no just cause for the unilateral termination of the Agreement by Honvéd and awarded the Player HUF 14,667,000 in compensation, corresponding to the amount in unpaid salary under the Agreement through 30 June 2016 (the "DRC Decision"). The DRC did not award travel expenses as no applicable contractual provision existed.

10. The DRC Decision was based on the applicability of the FIFA Regulations on the Status and Transfer of Players (edition 2014 and 2015) (the "FIFA Regulations"), and the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (the "FIFA Procedural Rules"), and the jurisdiction conferred to the DRC by the FIFA Regulations.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

11. On 9 November 2015, the Appellant filed its Statement of Appeal, to be considered as its appeal brief according to Articles R47, R48 and R51 of the Code of Sports-related Arbitration (the "Code").

12. In its Statement of Appeal, Appellant requested that a sole arbitrator be appointed by the CAS.

13. On 16 November 2015, the CAS Court Office confirmed receipt of the statement of appeal to the parties and informed them of deadlines applicable under the Code with respect to the submission of an appeal brief, as well as expressing a position on the language of arbitration and the nature of the arbitration panel. Responsibilities as to costs of arbitration were also outlined.

14. Also on 16 November 2015, the CAS Court Office informed FIFA of the existence of the appeal, setting a ten-day deadline for FIFA to state whether it intended to join the proceedings as a party.

15. On 17 November 2016, Appellant wrote to the CAS to state that its statement of appeal as to be considered as its appeal brief. The CAS Court Office informed FIFA of this the following day.

16. On 27 November 2016, FIFA wrote to the CAS to announce that it renounced its right to be a party to the procedure, and sent a clean copy of the FIFA DRC decisions and related

notifications for the file. In the same letter, it provided some "technical observations" which it considered relevant, "aimed at reminding the Sole Arbitrator/Panel of the pertinent jurisprudence with regards to jurisdiction-related questions".

17. On 30 November 2015, the CAS Court Office advised the parties of FIFA's correspondence and also advised Appellant that Respondent remained unreachable by courier, and asked Appellant to provide a valid email address or phone number to contact Respondent.

18. On 4 January 2016, Respondent's counsel advised the CAS that he was now representing Respondent, and sought a new deadline for the filing of an answer after payment by Appellant of his share of the advance on costs, further to Article R55 para. 3 of the Code. The CAS Court Office confirmed receipt of the letter on the same day and confirmed that the previous time limit set for the filing of an answer was set aside, and that a new one would be set following receipt of Appellant's share of the advance on costs.

19. On 5 January 2016, the CAS Court office wrote to the parties noting that Respondent had not provided its position with respect to Appellant's suggestion to submit the matter to a sole arbitrator within the set time limit. As a result, the question of the composition of the Arbitral Tribunal would be submitted to the President of the CAS Appeals Arbitration Division in accordance with Article R50 para. 1 of the Code.

20. On 11 February 2016, the CAS Court Office wrote to the parties advising them that the Appellant had paid its share of the advance on costs, and setting a deadline of 20 days from receipt of its letter for the submission of Respondent's answer.

21. On 12 February 2016, the CAS Court Office notified the parties that the President of the CAS Appeals Arbitration Division had appointed Mr Alexander McLin, Attorney-at-law in Geneva, Switzerland, as Sole Arbitrator.

22. On 2 March 2016, Respondent filed his answer in accordance with Article R55 para. 1 of the Code.

23. On 3 March 2016, the CAS Court Office acknowledged receipt of Respondent's answer to the parties, and notified them that further to Article R56 of the Code, unless the parties agree or the Sole Arbitrator orders otherwise on the basis of exceptional circumstances, *"**the parties shall not be authorized** to supplement or amend their request or their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to rely, after the submission of the appeal brief and of the answer"* (emphasis original). The parties were also asked to inform the CAS Court Office by 10 March 2016 as to whether they asked for a hearing to be held.

24. On 9 March 2016, the Respondent provided its position, namely that a hearing was unnecessary in light of the legal nature of the issues at stake. This position was forwarded to Appellant by the CAS Court Office the same day.

25. On 10 March 2016, the Appellant also stated that in its view, a hearing was unnecessary. This letter was forwarded to Respondent the same day, with a statement by the CAS Court office that the Sole Arbitrator would decide on the issue of the hearing.

26. On 15 March 2016, the CAS Court Office sent the Order of Procedure to the parties for signature, which included *inter alia* a provision that the Sole Arbitrator considered himself sufficiently well-informed to decide the matter without oral presentations.

27. On 16 March 2016, Appellant returned the signed Order of Procedure, together with a brief additional legal submission.

28. On 21 March 2016, Respondent returned its copy of the signed Order of Procedure, drawing attention to the CAS Court Office's letter of 3 March 2016, in which it was stated that arguments could no longer be supplemented, and that, in its view, no exceptional circumstances appeared to exist, but that in the event the Sole Arbitrator decided to admit the additional submission, that Respondent expected to be afforded an opportunity to respond.

IV. SUBMISSIONS OF THE PARTIES

29. The Appellant's submissions, in essence, may be summarized as follows:

- Appellant argues that the DRC decision is unsubstantiated and unfair. It states that the Player had explicitly agreed in the Agreement to the possibility of early unilateral termination. Moreover, it argues that such termination is compatible with Hungarian labor law, which is applicable. In addition, the Agreement contains a forum selection clause which determines that disputes between the parties than cannot be settled amicably must be brought before state courts in Hungary. In light of this, FIFA's decision "*not only interferes with the controlling and approval system of a member country, but also violates the rights of self-determination of the member country*". Appellant contends that the Agreement was not unilateral in nature given the Player's explicit consent to the early performance-based termination provision.

- The Appellant makes the following requests for relief:

  "We would kindly ask the CAS to change FIFA's above referenced decision, dismiss the Player's demand and oblige him to pay the cost of litigation".

30. The Respondent's submissions, in essence, may be summarized as follows:

- The Player argues that the DRC properly had jurisdiction to address and rule on his initial claim under the applicable rules. Moreover, Appellant makes its jurisdictional objection too late and must therefore be deemed to have waived its right any right to do so. Finally, the forum selection clause in favor of Hungarian courts is invalid by virtue of being in breach of the FIFA Regulations.

- In addition, the Player contends that the applicable rules of law are the FIFA Regulations, in keeping with CAS case law. Finally, Respondent argues that the Agreement was terminated without just cause in that under the applicable FIFA Regulations, the parties cannot deviate from what constitutes "just cause" under Article 14 of the FIFA Regulations, and insufficient performance cannot constitute "just cause" thereunder.

- The Respondent makes the following requests for relief:

  "… Mr Traoré requests that the Court of Arbitration for Sport:

  (i) DISMISS the appeal filed by the Club and confirm the decision of the Dispute Resolution Chamber of FIFA issued on 12 May 2015;

  (ii) REJECT any further claim by the Club;

  (iii) ORDER the Club to bear all procedural and legal costs of the parties".

V. JURISDICTION

31. Article R47 of the Code provides as follows:

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.

32. In addition, the parties have chosen the following regulation and rules of law in Article VI.4. of the Agreement:

"By signing this contract Parties accept the regulations of the FIFA, UEFA, Hungarian Football Federation, the Hungarian Labor Code and the Hungarian Sport Law Code as binding upon them".

33. Moreover, the following clause in Article VI.2. of the Agreement includes the following combination of forum selection and choice of law:

"If any dispute should arise between them related to the present contract, they shall try to settle amicably by talks, but if this is not possible they will turn to the Hungarian Court and Hungarian laws shall apply".

34. Article 67 para. 1 of the FIFA Statutes grants the Player a right of appeal to CAS from a decision of the DRC. In addition, the Parties have both signed the Order of Procedure, expressly consenting thereby to CAS jurisdiction.

35. Appellant does not expressly challenge the jurisdiction of the CAS. Indeed, its request that the CAS *"change FIFA's … decision, dismiss the Player's demand and oblige him to pay the cost of litigation"* necessarily implies that the CAS must have jurisdiction in order to decide. However,

its reference to this contractual provision appears to suggest that it considers that the DRC may have been the wrong forum for Respondent to have brought his initial claim.

36. For an arbitral tribunal to have jurisdiction, the following conditions must be satisfied: (i) the subject-matter of the dispute is capable of settlement by arbitration; (ii) the arbitration agreement is valid in terms of form and substance; (iii) the dispute is within the scope of the arbitration agreement both *ratione materiae* and *ratione personae*; and (iv) the parties had the capacity to enter into a binding arbitration agreement. (BERGER/KELLERHALS, *International Arbitration in Switzerland*, 3nd ed., Berne 2015, para. 687).

37. The specific provisions of the FIFA Regulations (Articles 22(b) and 24 paras. 1 and 2) provide that FIFA is competed to rule on *"employment-related disputes between a club and a player of an international dimension"*.

38. The *lex arbitri*, Chapter 12 of the Swiss Private International Law Act ("SPILA"), provides in Article 177(1) that *"Any dispute involving an economic interest may be the subject-matter of an arbitration"*. *"Disputes arising out of and in connection with employment contracts are in almost all cases of 'financial interest' and thus, generally considered as arbitrable under [Article 177(1) SPILA], no matter what the law governing the relevant employment contract may say on the arbitrability of disputes arising from such contracts"*. (BERGER/KELLERHALS, para. 245).

39. As Respondent and FIFA both observe, Appellant did not raise a challenge before the FIFA DRC with respect to its jurisdiction. It can therefore be deemed to have waived any jurisdictional objection further to established CAS and Swiss Federal Court case law (See CAS 2011/A/2375, and SFC 4A_386/2010, 3 January 2011, at 5.2). Indeed, the lack of any plea of lack of jurisdiction before the DRC would likely have been sufficient to confer jurisdiction on the DRC absent a specific agreement altogether (BERGER/KELLERHALS, para. 644).

40. There are no issues of *lis pendens* to consider as it has not been brought to the Sole Arbitrator's attention that any action is pending before the Hungarian courts (or elsewhere).

41. The CAS, therefore, has jurisdiction to decide this appeal.

VI. ADMISSIBILITY

42. Article 67 para. 1 of the FIFA Statutes (2015) provides:

Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question.

43. Article 67 para. 2 of the FIFA Statutes (2015) states:

Recourse may only be made to CAS after all other internal channels have been exhausted.

44. The Parties received the DRC decision from FIFA on 22 October 2015.

45. The Appellant submitted his Statement of Appeal on 9 November 2015.

46. The appeal is therefore admissible.

VII. APPLICABLE LAW

47. Article 187 para. 1 SPILA provides as follows:

The arbitral tribunal shall decide on the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection.

48. Article R58 of the Code provides more specifically as follows:

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.

49. Article VI.4 of the parties' Agreement states the following:

By signing this contract the Parties accept the regulations of the FIFA, UEFA, Hungarian Football Federation, the Hungarian Labor Code and the Hungarian Sport Law Code as binding upon them.

50. Article 178 para. 2 SPILA provides that:

As regards its substance, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the law governing the main contract, or if it conforms to Swiss law.

51. The fact that the parties appear to have chosen a combination of rules of law does not invalidate the agreement to arbitrate, which need only conform with Swiss law further to the conflict of laws rule *in favorem validitatis* established by Article 178 para. 2 SPILA (BERGER/KELLERHALS, para. 393).

52. The manner in which a combination of rules of law and regulations should be applied in the context of a given dispute has been the subject of numerous CAS cases (see *e.g.* CAS 2013/A/3401, CAS 2013/A/3383-3385, and CAS 2014/A/3742). In his analysis of these decisions, Ulrich Haas concludes that following agreement on CAS as the court of arbitration, Article 58 of the Code, implicitly agreed to by the parties, *"takes precedence over any explicit choice of law by the parties (for example in the contract), since the purpose of Art. 58 of the CAS Code is to restrict the autonomy of the parties. This Article provides for a mandatory hierarchy of the applicable legal framework, which the parties cannot change. Consequently the parties are entitled to freedom of choice of law solely within the limits set by Art. R58 of the CAS Code, with the result that they can only determine the subsidiarily applicable law. In contrast, under Art. 58 of the CAS Code, the "applicable regulations" always primarily apply, regardless of the will of the parties"* (HAAS U., "Applicable law in football-related disputes –

The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law", *CAS Bulletin 2015/2*, p. 17.)

53. Applying this hierarchy to the present matter, the FIFA Statutes and Regulations are applicable first and principally (together with the regulations of UEFA and the Hungarian Football Federation), and are subject to Swiss law with respect to their interpretation and application where they seek to set uniform standards internationally. The Hungarian Labor Code, Hungarian Sport Law Code, and Hungarian law more generally are to be considered as applicable subsidiarily.

VIII. MERITS

54. The Appellant's arguments are essentially dependent on applicable law. In their view, if Hungarian law were applicable to the dispute and the underlying Agreement, the latter would have been considered validly terminated further to its provision V. following the performance-based evaluation of the Player contained therein.

55. Further to the conclusions above on the applicable law, however, one must first determine whether the termination was valid under the FIFA Regulations. Under Article 14 of the FIFA Regulations, an employment contract between player and club may only be validly terminated without compensation where there is just cause, and, according CAS precedent, *"there is no room for conflicting or diverging provision agreed directly between the parties"* (CAS 2009/A/1956 para 20).

56. As Respondent correctly points out, a player's performance (or lack thereof) cannot constitute just cause *ipso facto*, and termination of an employment contract on the basis of insufficient performance *"further to the consistent case law of the DRC, must be regarded as a termination without just cause"* (CAS 2007/A/1233 & 2007/A/1234, para. 27. In the original French, *"selon la jurisprudence constante de la CRL, la résiliation anticipée et immédiate d'un contrat de travail par un club en raison des performances insuffisantes d'un sportif doit être considérée comme une résiliation sans justes causes"*.

57. As a result of the foregoing, whether the Player, as the Appellant points out, did not raise any objections upon review of the Agreement, is not relevant to the outcome. As the provision allowing for a unilateral termination for performance is invalid under the FIFA Regulations (which take precedence), its validity under Hungarian law would not have any effect and need not be considered.

58. With respect to Appellant's argument that the FIFA DRC decision *"not only interferes with the controlling and approval system of a member country but is also violates the rights of self-determination of the given country"* (*sic*), as a member of the Hungarian Football Federation, the Appellant is bound by the rules that its national football federation has adhered to as a member of FIFA. These rules serve *inter alia* the purpose of creating *"a standard set of rules to which all the actors within the football community are subject to and can rely on"* (Decision of the Single Judge of the FIFA Players' Status Committee of 26 August 2014, para. 17). As private actors, Appellant and the Hungarian Football Federation are free to contract and agree to rules governing their entities

that are compatible with global standards and are applied within international private law norms.

59. As a result of the foregoing, the Sole Arbitrator does not see a basis upon which to change the decision of the FIFA DRC.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by Budapest Honvéd FC on 9 November 2015 against the decision issued by the FIFA Dispute Resolution Chamber on 12 May 2015 is dismissed.

2. The decision issued by the FIFA Dispute Resolution Chamber on 12 May 2015 is confirmed.

(…)

5. All other motions or prayers for relief are dismissed.