

ARBITRAL AWARD

(BAT 0527/14)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert SC

in the arbitration proceedings between

Mr. Jaka Klobucar

represented by Mr. Blaz Bolcar, attorney at law
Law Office Bolcar, Cesta IX, Korpusa 46, 5250 Solkan, Slovenia

- Claimant -

vs.

Basketball Club Partizan
Humska 1, 11000 Belgrade, Serbia

- Respondent -

represented by its Director, Mr. Mlajdan Silobad

1. The Parties

1.1 The Claimant

1. Mr. Jaka Klobucar ("Player") is a professional basketball player.

1.2 The Respondent

2. Basketball Club Partizan ("Respondent") is a professional basketball club in Belgrade, Serbia.

2. The Arbitrator

3. On 13 March 2014, Prof. Richard H. McLaren, President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Klaus Reichert SC as arbitrator ("Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal ("BAT Rules"). None of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Background and the Dispute

4. Player was contracted to play for Respondent for the 2010-2011, 2011-2012 and 2012-2013 seasons. During the first season things did not work out satisfactorily and the Parties went their separate ways by means of a Settlement Agreement dated 15 March 2011.
5. The Settlement Agreement provided that Respondent would pay to Player a net amount of EUR 53,000.00 in four instalments spread out in March and April 2011. In

the event of non-compliance with the agreed payment schedule, Respondent would pay an additional amount of EUR 200,000.00 to Player.

6. The Settlement Agreement was not observed (insofar as agreed payments to Player were concerned) by Respondent.
7. In the very last step taken in this arbitration, Respondent has admitted the validity of Player's claims (save for disputing the amount of costs).

3.2 The Proceedings before the BAT

8. On 12 February 2014, Player filed a Request for Arbitration dated 7 February 2014 in accordance with the BAT Rules.
9. The non-reimbursable handling fee in the amount of EUR 3,000.00 was paid on 7 February 2014.
10. On 1 March 2014, the BAT informed the Parties that Mr. Klaus Reichert SC had been appointed as the Arbitrator in this matter. Further, the BAT fixed the advance on costs to be paid by the Parties as follows:

"Claimant (Mr Jaka Klobucar) EUR 5,000

Respondent (Basketball Club Partizan) EUR 5,000"

The foregoing sums were paid as follows (all by Player): 27 March 2014, EUR 5,000.00; and 24 April 2014, EUR 5,000.00.

11. Respondent did not file an Answer notwithstanding two opportunities given to it to do so.
12. On 7 May 2014, the Parties were notified that the exchange of documentation was

closed in accordance with Article 12.1 of the BAT Rules. The Parties were invited to submit their respective claims for costs.

13. On 16 May 2014, Player filed his claim for costs.
14. Respondent did not file a claim for costs. However, on 21 May 2014 Respondent did make observations on the costs of Player. In that letter Respondent admitted that Player had a valid claim, but disputed the costs being sought.

4. The Positions of the Parties

15. Player has asserted that he has not been paid all the amounts due to him under the Settlement Agreement, and rather than invoking his right to an agreed liquidated damages amount of EUR 200,000.00 he has limited his claim to EUR 120,000.00 plus interest and costs.
16. In its letter dated 21 May 2014, the Respondent admitted the debt to the Claimant and objected to the claim on costs as being disproportionate for the work required in the proceedings at hand.

5. The Jurisdiction of the BAT

17. Pursuant to Article 2.1 of the BAT Rules, “[t]he seat of the BAT and of each arbitral proceeding before the Arbitrator shall be Geneva, Switzerland”. Hence, this BAT arbitration is governed by Chapter 12 of the Swiss Act on Private International Law (PILA).
18. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.

19. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.¹
20. The jurisdiction of the BAT is stated by Player to result from clause 6 of the Settlement Agreement, which reads as follows:

“In the event of any dispute or claim relating to this Settlement Agreement, the Parties agree to submit to, and waive any objection to, the exclusive jurisdiction and venue of the FIBA Arbitral Tribunal (“FAT”) in Geneva, Switzerland in accordance with the FAT Arbitration Rules. Accordingly, any dispute arising from or related to the present contract shall be submitted to the FAT in Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private Interantional Law (PIL), irrespective of the parties’ domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono. The prevailing party shall be entitled to recover all costs, fees, and attorney’s fees from the other party in any such dispute.”
21. This arbitration clause is in written form and thus it fulfils the formal requirements of Article 178(1) PILA. The reference to FAT is understood to be a reference to BAT (Article 18.2 of the BAT Rules).
22. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration clause under Swiss law (referred to by Article 178(2) PILA).
23. Finally, Respondent did not call into question the BAT’s jurisdiction when submitting its letter dated 21 May 2014.
24. For the above reasons, the Arbitrator has jurisdiction to adjudicate upon the claims.

¹ Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.

6. Discussion

6.1 Applicable Law – ex aequo et bono

25. With respect to the law governing the merits of the dispute, Article 187(1) PILA provides that the arbitral tribunal must decide the case according to the rules of law chosen by the parties or, in the absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PILA adds that the parties may authorize the Arbitrators to decide “*en équité*” instead of choosing the application of rules of law. Article 187(2) PILA is generally translated into English as follows:

“the parties may authorize the arbitral tribunal to decide ex aequo et bono”.

26. Under the heading “Applicable Law”, Article 15.1 of the BAT Rules reads as follows:

“Unless the parties have agreed otherwise the Arbitrator shall decide the dispute ex aequo et bono, applying general considerations of justice and fairness without reference to any particular national or international law.”

27. As noted above (paragraph 17) the arbitration agreement specifically empowers the Arbitrator to rule ex aequo et bono.

28. Therefore, the Arbitrator will decide the dispute at hand ex aequo et bono.

29. The concept of “*équité*” (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the Concordat intercantonal sur l’arbitrage² (Concordat)³, under which Swiss courts have held that arbitration “*en équité*” is fundamentally different from

² That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration) and, most recently, the Swiss Code of Civil Procedure (governing domestic arbitration).

³ P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

arbitration “en droit”:

“When deciding ex aequo et bono, the Arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules.”⁴

30. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives “a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case.”⁵
31. This is confirmed by Article 15.1 of the BAT Rules *in fine*, according to which the Arbitrator applies “general considerations of justice and fairness without reference to any particular national or international law.”
32. In light of the foregoing considerations, the Arbitrator makes the findings below.

6.2 Findings

33. The claim has been admitted by Respondent by its letter dated 21 May 2014. It could not have been more explicit in that regard: “*The Respondent has indisputable debt toward the Claimant, which is not in question at all.*” The sole reason for non-payment is Respondent’s financial situation.
34. The Arbitrator holds and finds that Respondent is liable to Player in the amount of EUR 120,000.00, net. The Arbitrator specifically notes that this amount is in fact less than that Player might have claimed under the Settlement Agreement, and therefore Respondent has the benefit of facing a lower liability than might otherwise have been

⁴ JdT 1981 III, p. 93 (free translation).

⁵ Poudret/Besson, *Comparative Law of International Arbitration*, London 2007, No. 717. pp.625-626.

the case. The reduction applied by Claimant itself to the liquidated damages provided for in the Settlement Agreement is deemed fair under the circumstances of this case.

35. As regards interest, the Arbitrator notes that on 29 November 2013, Player's Counsel specifically stated by letter to Respondent that Player was willing to accept EUR 120,000.00 net provided this was made within 8 days. No such payment was made. It appears just and equitable to the Arbitrator that interest at 5% per annum should run from 7 December 2013 until payment.

7. Costs

36. Article 17 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.
37. On 9 June 2014 – considering that pursuant to Article 17.2 of the BAT Rules “*the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator*”, and that “*the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time*”, taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised – the BAT President determined the arbitration costs in the present matter to be EUR 5,580.00.
38. Considering that Player prevailed in his claims, it is fair that the fees and costs of the arbitration be borne by Respondent and that it be required to cover its own legal fees (none were advanced in this case) and expenses as well as those of Player (subject to

a reduction as per para. 39 below). This is also consistent with the final sentence of the arbitration agreement.

39. Player's claim for legal fees and expenses amounts to EUR 10,000.00 inclusive of the EUR 3,000.00 non-reimbursable handling fee. This is the maximum amount which can be awarded against a losing party under the BAT Rules. The Arbitrator considers that the circumstances of this case do not warrant the maximum figure of EUR 10,000.00 as there was only one submission filed by Player, and he did not have to address any substantive answer.
40. The Arbitrator considers that EUR 6,000.00 is an appropriate amount in respect of legal fees and expenses.
41. Given that Player paid advances on costs of EUR 10,000.00, as well as a non-reimbursable handling fee of EUR 3,000.00 (which, as noted above, is taken into account when determining Player's legal expenses), the Arbitrator decides that in application of article 17.3 of the BAT Rules:
 - (i) BAT shall reimburse EUR 4,420.00 to Player, being the difference between the costs advanced by him and the arbitration costs fixed by the BAT President;
 - (ii) Respondent shall pay to Player EUR 5,580.00, being the difference between the arbitration costs advanced by him and the amount he will receive as reimbursement from the BAT.
 - (iii) Respondent shall pay EUR 6,000.00 to Player, representing a contribution to his legal fees and expenses.



BASKETBALL
ARBITRAL TRIBUNAL

8. AWARD

For the reasons set forth above, the Arbitrator decides as follows:

1. **Basketball Club Partizan must pay Mr. Jaka Klobucar EUR 120,000.00 net for unpaid salary together with interest at 5% per annum from 8 December 2013.**
2. **Basketball Club Partizan must pay Mr. Jaka Klobucar EUR 5,580.00 as reimbursement for his arbitration costs.**
3. **Basketball Club Partizan must pay Mr. Jaka Klobucar EUR 6,000.00 as a contribution to his legal fees and expenses.**
4. **Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 12 June 2014

Klaus Reichert SC
(Arbitrator)