ARBITRAL AWARD

(BAT 1158/18)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Ms. Annett Rombach

in the arbitration proceedings between

Mr. Rimas Kurtinaitis

- Claimant -

represented by Mr. Branko Pavlović, attorney at law,
Brace Radovanovica 16 Street, 11000 Belgrade, Serbia,

vs.

BC Khimki
27 Kirov Str., 141400 Khimki, Moscow Region, Russia

- Respondent -

represented by Mr. Pavel Astakhov, General Director

BASKETBALL
ARBITRAL TRIBUNAL

1. The Parties

1.1 The Claimant

1. Mr. Rimas Kurtinaitis (the “Coach” or “Claimant”) is a professional basketball coach of Lithuanian nationality.

1.2 The Respondent

2. BC Khimki (the “Club” or “Respondent” and together with Claimant the “Parties”) is a professional basketball club located in Khimki, Russia.

2. The Arbitrator

3. On 8 February 2018, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (the "BAT"), appointed Ms. Annett Rombach as arbitrator (the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (the "BAT Rules"). Neither of the Parties has raised any objections to the appointment of the Arbitrator or to her declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

4. On 22 July 2015, the Coach and the Club entered into a contract (the “Coach Contract”), pursuant to which the Club engaged the Coach as its head coach for three basketball seasons (2015-16, 2016-17, 2017-18).

5. On 1 August 2016, the Parties executed a settlement agreement (the “Settlement Agreement”) by which they terminated the Coach Contract with immediate effect (Clause 1 of the Settlement Agreement). Pursuant to Clause 2 of the Settlement

Agreement, in consideration for the immediate termination of the Coach Contract, and with a view to settle all outstanding obligations thereunder, the Club promised to pay the Coach a total amount of EUR 1,000,000.00, payable pursuant to the following schedule:

- EUR 250,000.00 by 15 September 2016;
- EUR 250,000.00 by 15 January 2017;
- EUR 250,000.00 by 15 September 2017;
- EUR 250,000.00 by 15 January 2018.

6. In case of a payment default, Clause 4 of the Settlement Agreement provided as follows:

> *"If any of the above payment is delayed by more than 14 days, then this Settlement Agreement may be terminated by Kurtinaitis by means of a notice in writing to Khimki, effective upon receipt, and in such event Kurtinaitis shall have the right to immediate all payments by Khimki from Article 2 within 15 days after receipt by Khimki of the termination notice of Kurtinaitis."*

7. The Club paid the first two instalments under Clause 2 of the Settlement Agreement. It did, however, not make any further payments up to date.

3.2 The Proceedings before the BAT

8. On 25 January 2018, the Claimant filed a Request for Arbitration together with several exhibits in accordance with the BAT Rules. The non-reimbursable handling fee of EUR 5,000 had been received in the BAT bank account on 24 January 2018.

9. On 12 February 2018, the BAT informed the Parties that Ms. Annett Rombach had been appointed as Arbitrator in this matter, invited the Respondent to file its Answer in accordance with Article 11.2 of the BAT Rules by no later than 5 March 2018 (the "Answer"), and fixed the amount of the Advance on Costs to be paid by the Parties as follows:

"Claimant (Mr. Rimas Kurtinaitis)	*EUR 4,000*
Respondent (BC Khimki)	*EUR 4,000"*

10. On 6 March 2018, BAT acknowledged receipt of the full Advance on Costs (with both Parties having paid their respective shares). It noted Respondent's failure to submit an Answer and granted a final opportunity for Respondent to file an Answer by 13 March 2018.

11. On 7 March 2018, Respondent filed its Answer.

12. On 13 March 2018, the Arbitrator (in accordance with Article 12.1 of the BAT Rules) declared that the exchange of documents was completed and requested the submission of detailed cost accounts.

13. On 15 March 2018, Claimant filed his cost account.

14. As neither of the Parties requested to hold a hearing, the Arbitrator, in accordance with Article 13.1 of the BAT Rules, decided not to hold a hearing and to render the award based on the written record before her.

4. The Positions of the Parties and their Requests for Relief

4.1 Claimant's Position and Request for Relief

15. Claimant submits that Respondent failed to make the third payment under the Settlement Agreement, and that – in accordance with Clause 4 of the Settlement Agreement – the entire amount of the Settlement Agreement fell due as a result of Respondent's default.

16. Claimant requests the following relief:

> *"The Claimant requests for compensation, total amount of 500.000 EUR, net of all Russian taxes, plus interest at 5% per annum, from the date of RfA submission, onwards until final payment, costs of BAT arbitration and legal fees according to the BAT Award which will resolve this dispute."*

4.2 Respondent's Position and Request for Relief

17. Respondent acknowledges that an amount of EUR 500,000.00, which is due under the Settlement Agreement, has not been paid by it. Respondent argues that it is not allowed to make the payment under the applicable international banking regulations in force in Russia, because the Claimant does not have the status of an employee of the Club. The banks in Russia do not accept the Settlement Agreement as a "stand alone" document and do not give it any legal effect. Accordingly, Respondent is unable to effect the outstanding payments.

18. Respondent does not expressly request any relief, but it is evident that Respondent seeks the dismissal of the claims on the basis of the alleged defenses.

5. The Jurisdiction of the BAT

19. Pursuant to Art. 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").

20. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.

21. The Arbitrator finds that the dispute referred to her is of a financial nature and is thus arbitrable within the meaning of Art. 177(1) PILA.

22. The Settlement Agreement contains the following dispute resolution clause in favor of BAT (Clause 5):

> *"Any dispute arising from or related to this Settlement Agreement shall be submitted to the FIBA Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT 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, irrespective of the parties' domicile. The language of the arbitration shall be English. Awards of the BAT can be appealed to the Court of Arbitration for Sports (CAS), Lausanne, Switzerland. The arbitrator shall decide the dispute ex aequo et bono but in regards of any payment and terms stipulated in articles "B", "2.a.", 2.b.", "5" or potentially conducted payments and terms according to article "A" and "4" of this settlement, the arbitrator shall decide respecting principle pacta sunt servanda and shall not have the right to decide ex aequo et bono. The Arbitrator shall rule due to principal* [sic] *pacta sunt servanda in matters of financial conditions and payments (Article 3 and Article 4 of this Agreement) to be made to Head Coach and his representative stipulated in this agreement."*

23. The arbitration agreement is in written form and thus fulfills the formal requirements of Article 178(1) PILA.

24. With respect to substantive validity, the Arbitrator considers that there is no indication in the file which could cast any doubt on the validity of the arbitration agreement in the present matter under Swiss law (cf. Article 178(2) PILA).

25. Furthermore, Respondent has not challenged the jurisdiction of the BAT.

26. For the above reasons, the Arbitrator has jurisdiction to decide the present dispute.

6. Applicable Law

27. 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 reads as follows:

> *"the parties may authorize the arbitral tribunal to decide ex aequo et bono".*

28. 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."*

29. In Clause 5 of the Settlement Agreement (quoted above at para 22), the Parties have, in principle, mandated the Arbitrator to decide the present dispute *ex aequo et bono*. They have, however, purported to limit this mandate in respect of payment and financial matters, which the Arbitrator "*shall decide respecting principle pacta sunt servanda and shall not have the right to decide ex aequo et bono.*" The Arbitrator notes that this provision is somewhat unclear, because the reference to "*pacta sunt servanda*" is not a reference to a particular law or set of rules, but to a single legal principle applicable in many different laws, including when a dispute is decided *ex aequo et bono*. The Arbitrator understands that the Parties' reference to "*pacta sunt servanda*" regarding financial matters shall emphasize that it is particularly important to them that the Arbitrator follows the language of their contract for these matters before applying general considerations of justice and fairness which may not be imminently rooted in the contractual language.

30. While it is questionable whether this limitation of the Arbitrator's mandate is legally permissible under Swiss law and the BAT Rules, the issue is moot in the present case, because the findings, which the Arbitrator makes below, find a basis both in *ex aequo et bono* and in the principle of *pacta sunt servanda.*

7. Findings

31. Claimant requests outstanding amounts under the Settlement Agreement, plus default interest from the date of the filing of the Request for Arbitration. The Arbitrator will address both claims, in turn, below.

7.1 Outstanding payments under the Settlement Agreement

32. According to the Settlement Agreement, the Coach was entitled to receive a total amount of EUR 1,000,000.00 in consideration for the premature termination of the Coach Contract. The amount was payable in 4 equal instalments between 15 September 2016 and 15 January 2018. Claimant alleges that Respondent failed to pay the last two instalments in the amount of 2x EUR 250,000.00. Respondent does not dispute that these amounts have not been paid, but argues that international banking regulations applicable in Russia prohibit it from making payments to a non-employee.

33. The Arbitrator rejects Respondent's defense for three reasons: First, Respondent does not substantiate this generic objection by any means legally or factually. Respondent neither identifies the allegedly applicable regulations, nor does it explain why it is not possible in light of these regulations to pay the Coach in accordance with the Parties' agreement. Respondent, which bears the burden of proof to establish and evidence any defense against the invoked claims, has failed to introduce any relevant evidence. It is not the Arbitrator's task to investigate the substance of a potential defense that has been invoked as a blanked assertion without any supporting explanations. Second, the Arbitrator finds that Respondent's allegations are not even plausible in light of the fact that Respondent apparently made the first two instalments under the Settlement Agreement to the Coach, despite the fact that the Coach had not been an employee of the Club at the time these payments were made. Pursuant to Clause 1 of the Settlement Agreement, the employment relationship between the Coach and the Club ended on the date of the execution of the Settlement Agreement, i.e. on 1 August 2016. The first two payments were made afterwards without the Club raising the issue of the

allegedly problematic banking regulations. Third, even if it were true that banking regulations in Russia prevent the execution of payments from a club to a non-employee, this defense would be legally irrelevant. Any legal impossibility to carry out obligations which the debtor undertook vis-à-vis the obligor does, in principle, not affect the debtor's respective obligation. The debtor remains obligated to fulfill its obligations, or – if he is unable to do so – becomes liable for the payment of damages. Accordingly, even if it were indeed impossible for the Club to pay the Coach, such obligations would remain in place, or the Club would have to pay the Coach damages in an amount equal to the contractual payment obligation.

34. Given that Respondent's defense is without merit, and since the Arbitrator has no reasons to doubt the validity of the Settlement Agreement, she finds that Respondent is liable for the payment of the outstanding amounts (EUR 500,000.00) thereunder.

7.2 Interest

35. The Coach requests interest of 5% p.a. on the claimed amounts from the date of the submission of the Request for Arbitration.

36. Absent any applicable contractual provision addressing the interest rate, in accordance with constant BAT jurisprudence, the Arbitrator considers an interest rate of 5% per annum to be appropriate for the payments at issue here.

37. With respect to the starting date, the Arbitrator accepts the date of the filing of the Request for Arbitration, which was 25 January 2018. The outstanding amounts under the Settlement Agreement, which had fallen due on 15 September 2017 and 15 January 2018 (respectively), were fully due and payable by the time the Claimant initiated the present proceedings.

7.3 Summary

38. For the reasons set forth above, the Coach is entitled to receive EUR 500,000.00 (net) as compensation under the Settlement Agreement, plus interest of 5% p.a. from 25 January 2018 until payment.

8. Costs

39. 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 legal fees and expenses incurred in connection with the proceeding.

40. On 6 July 2018 – 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"; 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", and 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 5,950.00.

41. Considering that Claimant prevailed with all of his claims, it is appropriate that all of the fees and costs related to this arbitration be borne by Respondent and that Respondent be required to cover its own legal costs as well as the Claimant's reasonable legal costs and expenses.

42. Therefore, considering that both Parties paid their respective shares of the advance on costs (i.e. EUR 4,000.00 each) and in application of Article 17.3 of the BAT Rules, the

Arbitrator decides that Respondent shall reimburse Claimant in the amount of EUR 1,950.00, being the difference between the total arbitration costs and the arbitration costs already advanced by Respondent. The balance of the Advance on Costs, in the amount of EUR 2,050.00, will be reimbursed to Claimant by the BAT.

43. With respect to the Parties' legal fees and expenses, the Arbitrator finds that Claimant's legal costs in the amount of EUR 3,600 (excluding the handling fee) are reasonable under the circumstances. Accordingly, Claimant is entitled to a reimbursement for his legal fees (EUR 3,600) and the handling fee (EUR 5,000).

9. AWARD

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

1. **BC Khimki is ordered to pay Mr. Rimas Kurtinaitis EUR 500,000.00 net together with interest of 5% p.a. from 25 January 2018 until payment.**
2. **BC Khimki is ordered to pay Mr. Rimas Kurtinaitis EUR 1,950.00 as a reimbursement of the arbitration costs.**
3. **BC Khimki is ordered to pay Mr. Rimas Kurtinaitis EUR 8,600.00 as a contribution towards his legal fees and expenses.**
4. **Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 17 July 2018

Annett Rombach
(Arbitrator)