

ARBITRAL AWARD

(BAT 1342/19)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr. Nemanja Dangubić

- Claimant -

represented by Mr. Nenad Stojic, attorney at law,
Marka Oreskovica 9, 11000 Belgrade, Serbia

vs.

Basketball Club Crvena Zvezda
Mali Kalemegdan 2, 11000 Belgrade, Serbia

- Respondent -

1. The Parties

1.1. The Claimants

1. Mr. Dangubić (hereinafter the "Player") is a Serbian professional basketball player.

1.2. The Respondent

2. Basketball Club Crvena Zvezda is a professional basketball club located in Belgrade, Serbia.

2. The Arbitrator

3. On 14 February 2019, the Vice-President of the Basketball Arbitral Tribunal (hereinafter the "BAT"), Prof. Ulrich Haas, appointed Dr. Stephan Netzle as arbitrator (hereinafter the "Arbitrator") pursuant to Articles 0.4 and 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules"). The Parties did not raise any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1. Summary of the Dispute

4. On 14 July 2015, the Player and the Club signed a guaranteed employment agreement for the seasons 2015/2016 and 2016/2017 (the "Player Contract 1"). On 12 July 2016, the Player and the Club signed a new guaranteed employment agreement for the seasons 2016/2017 and 2017/2018 (the "Player Contract 2"). The Player left the Club after the 2017/2018 season.
5. The Player alleges that the Club had failed to pay salaries due in the 2016/2017 season of EUR 149,500.00, a bonus from the season 2017/2018 of EUR 5,000.00 and bonuses from the season 2015/2016 of EUR 33,000.00, i.e. EUR 187,500.00 in total.

6. The Club did not participate in this arbitration.

3.2. The Proceedings before the BAT

7. On 5 February 2019, the Claimant submitted his Request for Arbitration together with six exhibits, which was received by the BAT on the same day. The Claimant did not request a hearing. A non-reimbursable handling fee of EUR 3,000.00 was received in the BAT bank account on 1 February 2019.
8. On 18 February 2019, the BAT Secretariat issued the Confirmation Letter by which the Respondent was invited to submit its Answer until 11 March 2019. The BAT Secretariat also requested that the Parties pay the following amounts as Advance on Costs by no later than 28 February 2019:

<i>“Claimant (Mr. Nemanja Dangubic)</i>	<i>EUR 4,000.00</i>
<i>Respondent (BC Crvena zvezda)</i>	<i>EUR 4,000.00</i>
9. The entire Advance on Costs was paid by the Claimant on 27 February and 25 March 2019.
10. The Respondent failed to submit an Answer despite a reminder of 13 March 2019.
11. By letter of 11 April 2019, the BAT Secretariat invited the Claimant to document the alleged *“efforts made by claimant to get from respondent and General Manager of the Club any information”* which *“remained without any positive response and concrete action.”*
12. On 11 April 2019, the Claimant provided a response, however without any documentation.
13. By letter of 7 May 2019, the Arbitrator granted the Respondent a further short and final time limit until 13 May 2019 to respond to the Request for Arbitration and also to the Claimant’s comments dated 11 April 2019. Again, the Respondent left this deadline unused.

14. By letter of 27 May 2019, the Arbitrator completed the exchange of documents and invited the Claimant to submit his accounts of costs. The Claimant submitted his account of costs on the next day.

4. The Positions of the Parties

4.1. The Claimant's Position

15. The Player played for the Club's team during the seasons 2015/2016, 2016/2017 and 2017/2018. When he left the Club after the season 2017/2018, an amount of EUR 187,500.00 was still open, namely unpaid salaries from the 2017/2018 season in the amount of EUR 149,500.00, a bonus for winning the Serbian championships 2017/2018 of EUR 5,000.00 and bonuses from the season 2015/2016 consisting of EUR 10,000.00 for winning the ABA League, EUR 5,000.00 for winning the Serbian Championships and EUR 18,000.00 for finishing the season in the Top 8 of the Euroleague.
16. When specifically asked by the Arbitrator whether there was any documentation about his endeavours to obtain the open payments, the Player replied on 11 April 2019:

"Offices of BC Crvena zvezda and Agency are very near each other, around 300 meters. Agency have a lot of players in BC Crvena Zvezda (for instance last year Dangubic, Lazic, Keselj, Simanic, Davidovac, Dobric, Lessort, Antic, Bjelica, Ennis....) so the most of the communication between them and the agent is in direct talk in offices or by phone, usually at least 5 times per week, so there is no record in written for that communications. Claimant Nemanja Dangubic played in BC Crvena zvezda until summer 2018 so this is why he didn't start the procedure earlier, regarding that 2015/16 debt. Its more than impossible to play for one team and at the same time to submit request to BAT. It would automatically come to the sanction, in way of non getting minutes, bad treatment in media e.t.c. Also, we need to underline that debt was bigger, and the Club paid partially. Sometimes 20 000 Euro, sometimes 10 000 Euro – and it was very difficult to understand, what they paid...From our point of view, if they have debts from the 2015/16, the first money what they pay in 2016/17 goes to covering debts. But, the Club did not want to go that way, and for player was really difficult to follow everything, especially playing for them."

4.2. The Claimant's Request for Relief

17. The Claimant requests:

*"a) To award claimant **Nemanja Dangubic** with amount of 187.500 EUR (one hundred eighty seven thousand five hundred) and additionally to award claimant's interest at the applicable statutory rate, starting from 26th of June 2018.*

b) To award claimant with the full covered costs of this Arbitration and legal fees and expenses. Having in mind that in case of dispute each Agreement set the authority of Basketball Arbitration Tribunal (BAT), therefore, the claimant demand arbitrage of BAT."

4.3. The Respondent's Position

18. The Club has not made any submissions in this arbitration – despite several reminders and additional time limits granted by the BAT. The BAT Secretariat has also double-checked that all communication to the Club was received at the Club's domicile.

5. The Jurisdiction of the BAT

19. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Respondent did not participate in this arbitration, he will examine his jurisdiction *ex officio* on the basis of the record as it stands.

20. 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).

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

22. 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.

23. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in Article 12 of the Player Contract 1 and Article 10 of the Player Contract 2, which are identical and read in the English translation submitted together with the Request for Arbitration as follows:

“In case of dispute, the BAT in Geneva shall be competent, which will resolve the dispute by a sole arbitrator, selected by the President of the Tribunal, and the application of the principle ex aequo et bono.”

24. The Player Contracts are in written form and thus the arbitration agreements meet the formal requirements of Article 178(1) PILA.
25. The Arbitrator considers that there is no indication in the file which could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA). While the scope of the arbitration clauses has not explicitly been defined, the Arbitrator finds that these agreements cover in any event the financial claims made under the Player Contracts.
26. For the above reasons, the Arbitrator finds that he has jurisdiction to adjudicate the Claimant's claims.

6. Other Procedural Issues

27. Article 14.2 of the BAT Rules specifies that *“the Arbitrator may [...] proceed with the arbitration and deliver an award”* if *“the Respondent fails to submit an Answer.”* The Arbitrator's authority to proceed with the arbitration in case of default by one of the parties is in accordance with Swiss arbitration law and the practice of the BAT.¹ However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.

¹ See *ex multis* BAT cases 0001/07; 0018/08; 0093/09; 0170/11.

28. This requirement is met in the present case. The Respondent was informed of the initiation of the proceedings and of the appointment of the Arbitrator in accordance with the relevant rules. It was also given sufficient opportunity to respond to Claimant's Request for Arbitration, and to his Account on Costs. Respondent, however, chose not to participate in this Arbitration.

7. Applicable Law

29. 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".

30. 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."

31. In Article 12 of the Player Contract 1 and Article 10 of the Player Contract 2, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono*. There is no reference to any other applicable law within Player Contract 1 and Player Contract 2. Consequently, the Arbitrator will decide the issues submitted to him *ex aequo et bono*.
32. 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'arbitrage of 1969² (Concordat),³

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).

under which Swiss courts have held that “*arbitrage en équité*” is fundamentally different from “*arbitrage 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

33. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives

“the mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he must stick to the circumstances of the case at hand.”⁵

8. Findings

8.1. Claim for payment

34. The Club does not dispute the Player’s claim for payment of EUR 187,500.00.
35. In case of silence of a party, it is still up to the Arbitrator to look at all circumstances before he is sufficiently convinced that the Player’s claim is justified. That is why he has asked the Player for documentation of his endeavours to enforce his money claims, some of which date back to the season 2015/2016.
36. The Arbitrator understands that the Player, who duly fulfilled the Player Contracts, hesitated to disturb his ongoing relationship with the Club by formal warnings, as explained by the Player in the email of 11 April 2019. However, this does not fully justify why the Player waited with any formal action with the goal of enforcing his substantial money claims by more than half a year or – in case of the unpaid bonuses from the 2015/2016 season, even more than 2 ½ years. Especially when it comes to the un-

³ KARRER, in: Basel commentary to the PILA, 3rd ed., Basel 2013, Article 187 PILA N 290.

⁴ JdT (Journal des Tribunaux), III. Droit cantonal, 3/1981, p. 93 (free translation).

⁵ POUDRET/BESSON, Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.

paid bonuses for the 2015/2016 season, the Player could and should have taken the opportunity of the signing of a new contract for the seasons 2016/2017 and formally insist on the settlement of all debts under the old contract before he renewed the employment for the following seasons.

37. A claim can be considered forfeited if it is not asserted within a reasonable period of time. Absent any specific circumstances a reasonable time period shall be deemed to have passed, if the facts giving rise to a claim date back more than two years without any explanation of the delay. The objection of forfeiture (“Verwirkung”) does not have to be raised by a party but shall be applied *ex officio*. It is justified by the particular time requirements in professional sport and the comparatively short career duration of professional players, which is also reflected e.g. in the right of the players to unilaterally terminate their employment after a relatively short payment delay by the clubs and the expedited dispute resolution procedures. This principle is not specific to litigation before the BAT. The Arbitrator notes that a similar provision can be found e.g. in the football industry. According to Article 25 para. 5 of the FIFA Regulations on the Status and Transfer of Players (RSTP) the competent adjudicatory body within FIFA “*shall not hear any case subject to these regulations if more than two years have elapsed since the event giving rise to the dispute. Application of this time limit shall be examined ex officio in each individual case.*” The Arbitrator deems that such principle is just and equitable and shall be applied also in the case at hand.
38. However, the Arbitrator also accepts that the Club had a procedural obligation to respond to the Player’s claims and to substantiate its opposition. The Club has not done so. Fairness demands that the Respondent should not profit from not participating in this arbitration.
39. The Arbitrator therefore acknowledges the claim for unpaid salaries and bonus payments under the 2017/2018 season, amounting to EUR 154,500.00, while he rejects the claims dating back to the 2015/2016 season because of forfeiture.

8.2. Payment modalities

40. The Claimant requests full payment in EUR. Article 5 of the relevant Player Contract 2 stipulates however, that

“All the above-mentioned amounts. referred to in articles 4) [salary payments] and 5) [bonus payments] are NET so that all duties and possible taxes related to these payments shall be borne by the Club. [inserts added]

All the above-mentioned amounts shall be paid in dinar equivalent at the middle exchange rate of National Bank of Serbia on the day of payment.”

41. This agreement on the payment modalities is binding also when it comes to the payment of the compensation for the unpaid salaries and bonus payments, especially since the Player is of Serbian nationality and still domiciled in Serbia, which means that payment in the local currency means no disadvantage or additional effort for him.
42. The contractual reference to the “NET” payments means that the dinar amount equivalent to EUR 154,500.00 must be paid by the Club without any deduction of duties and taxes due on this amount.

8.3. Interest

43. The Player requests interest “*at the applicable Swiss statutory rate*” on the due amounts, starting from 26 June 2018.
44. Although the Player Contracts do not contain any provisions obliging a debtor to pay interest, such interest can still be claimed if the relevant contract provides for a clear due date of the payment, However, the Arbitrator finds *ex aequo et bono* that no interest can be claimed when the lapse of time between the due date and the date of any verifiable activity of enforcement is also attributable to the creditor. The Arbitrator therefore accepts the Player’s claim for the payment of interest only from the day following the date of the Request for Arbitration.

9. Costs

45. 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.
46. On 19 July 2019 – 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 “[t]he 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 – in accordance with Article 0.4 of the BAT Rules the BAT Vice-President determined the arbitration costs in the present matter to be EUR 4,725.00
47. Considering the circumstances and the procedural behaviour of the parties, the Arbitrator finds it fair that the Club shall bear the full arbitration costs, despite the fact that the Player has not fully succeeded with his claims. Given that the Advance on Costs of EUR 8,000 was paid entirely by the Player, in application of Article 17.3 of the BAT Rules the Arbitrator decides that the Club shall reimburse EUR 4,725.00 to the Player. The difference between the advance on costs paid by the Player and the costs of these proceedings shall be reimbursed by the BAT Secretariat to the Player.
48. The Player claims legal fees and costs in the amount of EUR 9,000.00, not taking into account the non-reimbursable handling fee of EUR 3,000.00.
49. The Arbitrator finds that as a consequence of the outcome of the arbitration, the Club must contribute to the legal fees and costs of the Player. The maximum legal fees and costs in cases with an amount in dispute from EUR 100,001.00 to EUR

200,000.00 amount to EUR 10,000.00, excluding the non-reimbursable handling fee. The amount awarded to the Player is at the lower end of that bandwidth. In addition, the Player was not faced with any resistance and his submissions were rather limited in terms of volume and complexity. The Arbitrator therefore finds that the Club shall reimburse the Player with an amount of EUR 6,000.00, including the non-reimbursable handling fee.

10. AWARD

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

- 1. Basketball Club Crvena Zvezda is ordered to pay to Mr. Nemanja Dangubić the amount of EUR 154,500.00 net in dinar equivalent at the middle exchange rate of the National Bank of Serbia on the day of payment, plus interest of 5% since 6 February 2019.**
- 2. Basketball Club Crvena Zvezda is ordered to pay to Mr. Nemanja Dangubić the amount of EUR 4,725.00 as a reimbursement of his advance on arbitration costs.**
- 3. Basketball Club Crvena Zvezda is ordered to pay to Mr. Nemanja Dangubić the amount of EUR 6,000.00 as a reimbursement for his legal costs and expenses.**
- 4. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 23 July 2019

Stephan Netzle
(Arbitrator)