BASKETBALL
ARBITRAL TRIBUNAL

CORRECTED ARBITRAL AWARD

(BAT 1087/17)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert SC

in the arbitration proceedings between

Mr. Vladimir Micov

- Claimant 1 -

Mr. Jon Diebler

- Claimant 2 -

both represented by Mr. Miodrag Raznatovic, attorney at law,
Strahinjica bana 18, 11000 Belgrade, Serbia

vs.

Galatasaray Spor Kulübü Dernegi
Hasnun Galip Sok. No. 7-11, Beyoglu – Istanbul, Turkey

- Respondent -

represented by Mr. Süleyman Özgüç, attorney at law

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1. The Parties

1.1 The Claimants

1. Claimant 1 is Mr. Vladimir Micov ("Player 1"), a Serbian professional basketball player.

2. Claimant 2 is Mr Jon Diebler ("Player 2", and together with Player 2 the "Claimants"), an American professional basketball player.

1.2 The Respondent

3. Respondent is Galatasaray Spor Kulübü Dernegi ("Club"), a professional basketball Club in Istanbul, Turkey.

2. The Arbitrator

4. On 19 October 2017, Prof. Richard H. McLaren, President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Klaus Reichert, SC as arbitrator (the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (the "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 Dispute

5. As regards Player 1, on 15 June 2015 he and Club signed a professional basketball contract for the 2015-2016 and 2016-2017 seasons ("Player 1 Agreement"). His agreed, net, salary was set at EUR 570,000.00 for the 2015-2016 season and EUR 600,000.00 for the 2016-2017 season. For each season Player 1's salary was agreed

to be paid by Club in ten equal monthly instalments running from September to June.

6. Player 1 says that he was not paid the last two monthly instalments at the end of the 2016-2017 season which total EUR 120,000.00.

7. As regards Player 2, on 5 July 2016 he and Club signed a professional basketball contract for the 2016-2017 season ("Player 2 Agreement"). His agreed, net, salary was set at USD 550,000.00 to be paid by Club in ten equal monthly instalments running from September to June.

8. Player 2 says that he was not paid the last two monthly instalments at the end of the season which total USD 110,000.00.

9. Club says that certain fines, according to the internal rules and regulations, were levied against Claimants, and their claims are to be duly reduced (though not entirely extinguished)

10. The dispute in this arbitration is, therefore, centred on fines levied by Club on Claimants.

3.2 The Proceedings before the BAT

11. On 4 October 2017, Claimants filed a Request for Arbitration dated 29 September 2017 in accordance with the BAT Rules.

12. The non-reimbursable handling fee in the amount of EUR 5,000.00 was paid on 29 September 2017.

13. On 24 October 2017, 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 1 (Mr Vladimir Micov) EUR 2,000.00

Claimant 2 (Mr Jon Diebler) EUR 2,000.00

Respondent (Galatasaray Spor Kulübü Dernegi) EUR 4,000.00"

The foregoing sums were paid as follows: 17 November 2017, EUR 4,000.00 on behalf of Claimants; and 24 November 2017, EUR 4,000.00 on behalf of Claimants.

14. Respondent filed its Answer on 24 October 2017.

15. Claimants filed their second submission on 6 December 2017.

16. Respondent filed its second submission on 18 December 2017.

17. On 18 December 2017, the Parties were invited to set out (by no later than 27 December 2017) how much of the applicable maximum contribution to costs should be awarded to them and why. The Parties were also invited to include a detailed account of their costs, including any supporting documentation in relation thereto. Finally, the Parties were also notified that the exchange of documentation was closed in accordance with Article 12.1 of the BAT Rules.

18. Claimants filed their costs submission on 20 December 2017. Club filed its costs submission on 19 December 2017.

4. The Positions of the Parties

19. Claimants' position is as sought in their claims for relief in the Request for Arbitration:

"a) To award claimant Vladimir Micov with amount of 120.000 EUR (one hundred twenty thousand) and additionally to award claimant's interest at the applicable

Swiss statutory rate, starting from 16th of June 2017.

b) To award claimant Jon Diebler with amount of 110.000 USD (one hundred ten thousand) and additionally to award claimant's interest at the applicable Swiss statutory rate, starting from 16th of June 2017.

c) To award claimants with the full covered costs of this Arbitration. Having in mind that in case of dispute the agreements set the authority of Basketball Arbitration Tribunal (BAT), therefore, the claimants demand arbitrage of BAT."

20. In the Answer Club requests the Arbitrator to take into account the fines levied against Claimants along with an amount for car damage (directed against Player 2).

5. The Jurisdiction of the BAT

21. 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).

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

23. 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]

24. The jurisdiction of the BAT over Players' claims are stated to result from Articles 10 of the Player 1 Agreement and the Player 2 Agreement, which both read as follows in relevant part:

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

> *"Any dispute arising from or related to the present contact shall be submitted to the 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 (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 attorneys, fees from the other party in any such dispute in accordance with the award. This agreement may be translated into any language by the Club (at the Club's expense) for any purpose. However, it is agreed. that in the case of any controversy the English form will prevail."*

25. The arbitration clause is in written form and thus fulfils the formal requirements of Article 178(1) PILA.

26. 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 clauses under Swiss law (referred to by Article 178(2) PILA). In addition, the Respondent participated in the proceedings without raising any objections with respect to the jurisdiction of BAT.

27. For the above reasons the Arbitrator has jurisdiction to adjudicate the claims of the Parties.

6. Discussion

6.1 Applicable Law – ex aequo et bono

28. 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".*

29. 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."*

30. As noted in paragraph 24 above, the arbitration clauses expressly provide that the Arbitrator shall decide any dispute *ex aequo et bono*.

31. 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[2] (Concordat)[3], under which Swiss courts have held that arbitration "en équité" is fundamentally different from 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]

32. 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]

33. 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*."

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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.

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

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

34. In light of the foregoing considerations, the Arbitrator makes the findings below.

6.2 Findings

35. The doctrine of *pacta sunt servanda* (which is consistent with justice and equity – parties who make a bargain are expected to stick to that bargain) is the principle by which the Arbitrator will examine the merits of the claims.

Player 1

36. In the Player 1 Agreement the following is agreed at Article 7.1 (in relevant part):

> *"The Player must comply with the Club's reasonable internal rules and regulations attached herein (see annex A) as an integral part of this Agreement and accepts a disciplinary action and/or penalties or fines provided in same. The total amount of the penalties can not exceed 10% of the total amount of this agreement. The Club's Head Coach's and/or technical managers' or directors' report shall be the basis for such penalties."*

37. As a preliminary point, the Arbitrator notes that the internal rules and regulations (annex A) were not provided to him by either side.

38. Club exhibits a letter (signed by its Legal Counsel) dated 6 March 2017 from it to Player 1 by which it levies two fines in the total amount of EUR 30,000.00. The first fine, EUR 20,000.00, is described as arising from a failure by Player 1 to participate in a camp arranged on 27 February 2017. The second fine, EUR 10,000.00, is described as arising from a failure to attend the morning training arranged on 28 February 2017.

39. Club further exhibits a report to the Turkish Basketball Federation dated 8 March 2017 of fines it levied on its players, and the aforementioned two fines imposed on Player 1 are recorded.

40. Club also exhibits a letter dated 4 January 2017 which warns Player 1 that it was reported by the head coach and general manager that a disciplinary proceeding had been opened against him. This was stated to be on the basis of a non-attendance by Player 1 at a training camp on 30 December 2016. Player 1 was invited to present any submissions by no later than 6 January 2017. This letter is not followed up by Club with a written confirmation of a fine (*e.g.* in the manner of the letter of 6 March 2017 described just above); or at least there is no evidence placed before the Arbitrator which shows that a fine was levied, or notified to the Turkish Basketball Federation. Club says, in the Answer, that a fine of EUR 15,000.00 was levied, but this is not actually the case in the letter which is relied upon.

41. Player 1 says, in countering Club's position, that he appealed the two fines promptly but that he has had no response to such appeal (and also that Club, thereafter, paid a number of his monthly salaries in full leading him to believe that the fines were no longer an issue). He also asserts that the circumstances surrounding the fines were unreasonable, and therefore should be excused from them now.

42. The Arbitrator notes again that the Player 1 Agreement contains an express reference to the internal rules and regulations with a clear understanding that fines or penalties may be levied. Also, the Arbitrator has no idea whether an appeal is available to Player 1 from such fines or penalties as the internal rules and regulations were not placed before him by either side.

43. As to the three fines themselves and the procedures which were followed, the Arbitrator considers that it is in the very nature of a fine or penalty that these are correctly established. Given the consequence (namely, someone not getting the full contracted-for amount of money) it is important for the party imposing the fine or penalty to carefully comply with the procedural requirements. In general, close scrutiny of a fine or penalty is warranted as these can represent a significant diminution of a party's contracted-for monies, and indeed have reputational issues.

44. The Arbitrator finds that the two fines which were imposed by Club by the letter dated 6 March 2017 comport with the requirements of Article 7.1 of the Player 1 Agreement. The letter clearly articulates the reasons for the fines, and the amounts thereof. Player 1 is left in no doubt as to why there has been a fine, and the amounts involved. Also, the letter is signed by Club's legal counsel who must be taken to have exercised care and attention in the drawing up of such a serious document.

45. The Arbitrator finds that the letter of 4 January 2017 does not comport with the requirements of Article 7.1 of the Player 1 Agreement as its contents simply warn him of the impending disciplinary procedure. The letter itself does not purport to impose a fine or penalty, and no other document or evidence has been exhibited which might support the fine which Club asserts in the Answer. Thus, the Arbitrator will not uphold the fine of EUR 15,000.00 in this regard in order to reduce Player 1's claims.

46. The question, insofar as Player 1's claims are concerned, therefore revolve around whether the two fines (totalling EUR 30,000.00) imposed by the letter of 6 March 2017 are to be upheld as, effectively, set-off amounts.

47. The Arbitrator is effectively being asked by Player 1 to second guess the reasonabless of fines imposed by Club arising from the conduct of its training schedules. This presents considerable, if not insurmountable difficulties for the Arbitrator as it would effectively require him to decide, from a sporting point of view, whether such sessions should have been scheduled, and whether players were correctly required to attend. No arbitrator can make such a decision save perhaps in exceptional factual circumstances or cases where the club abuses its discretion. Indeed, a wide margin of appreciation and discretion must be afforded to a club in the conduct of its training schedules. It also does not appear to the Arbitrator to be the case that Club effectively waived the fines by continuing to pay monthly salaries without deduction. The fines were not an after-the-fact contrivance, and the precise moment when they were to be

deducted is not specifically provided for in either contract. Of course it would have been preferable for Claimants to have seen the deduction in their salary instalments as soon as possible afterwards, as that would have crystalized their positions at an earlier point in time.

48. The Arbitrator does not accept Player 1's position that the fines imposed by the letter dated 6 March 2017 should be overlooked for the purposes of this claim. Thus, Player 1's claim will be reduced by the amount of EUR 30,000.00 by reason of the fines imposed by that letter. Thus, Player 1's claim of EUR 120,000.00 for the last two monthly instalments of this salary is reduced to EUR 90,000.00. Player 1 is awarded that amount.

49. Turning to the claims of Player 2, precisely the same fines (USD 20,000.00 and USD 10,000.00) are levied against him by an identical (to the one sent to Player 1) letter dated 6 March 2017. The Player 2 Agreement contains an identical provision incorporating the internal rules and regulations of Club as discussed above. Thus, the Arbitrator has no reason to consider anything other than that these two fines can be used by Club to set-off (in part) the claim of Player 2. Thus, Player 2's claim for USD 110,000.00 is reduced to USD 80,000.00.

50. There is one additional matter concerning Player 2 which Club raises, namely, the costs arising from damage to a car. Club exhibits an invoice in the amount of TRY 6,334.37 dated 25 July 2017. Club says that this was for damage to a car it hired for Player 2. Article 3.B of the Player 2 Agreement provides that Club is to provide Player 2 with a car but that he is to be responsible for any damage.

51. Player 2 does not dispute the invoice for the damage to the car, nor the conversion amount in USD asserted by Club (USD 1,780.53). Thus, Player 2's claim is further reduced by that amount to USD 78,219.47. The Arbitrator finds that that amount is due to Player 2.

52. Finally, as regards interest, a point which immediately arises for the Arbitrator is that Club has effectively admitted (in the Answer) that it considered that it owed money to both Claimants, but sought a partial set-off as already discussed above. What is unclear to the Arbitrator is why Club did not simply pay Claimants the amount it did not dispute in a timely fashion, and then the dispute (and the arbitration) would have been of a much narrower and less costly scope.

53. The rate which is long-established in BAT awards is 5% per annum. Claimants are entitled to interest as that is a reasonable compensation to them for being wrongly kept out of their salaries by Club. The starting date sought by Claimants is 16 June 2017, namely the next day after the final monthly instalment was due to them both. In the circumstances, the Arbitrator fixes that date as the date from which interest at 5% per annum on the awarded amounts runs until payment in full by Club.

7. Costs

54. 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.

55. On 28 April 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*", 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 8,000.00.

56. Considering that Claimants prevailed in large measure in this arbitration (and also noting that there was no reason for Club to not pay on time at least that part of the salaries it considered to be owing) it is consistent with the provisions of the BAT Rules that the fees and costs of the arbitration, as well as their reasonable costs and expenses, be borne by Club subject to the points made below.

57. Player 1 seeks EUR 10,000.00 for reasonable legal fees and other expenses. Player 2 seeks EUR 7,500.00 for reasonable legal fees and other expenses. These are the maximum amounts, given the respective sizes of the claims made, which the Arbitrator can award. No reason is articulated by Claimants as to why they should be awarded such a maximum amount notwithstanding the requirement in that regard set out in the letter from the BAT dated 18 December 2017 closing the proceedings. That letter could not have been clearer ("*[T]he parties are herewith granted a deadline until Wednesday, 27 December 2017 to set out how much of the applicable maximum contribution should be awarded to them and why"*).

58. In the absence of any stated reasons why Claimants should be given the maximum awardable amount of reasonable legal fees and other expenses, and also noting that a number of Club's set-off defences reduced the overall amounts awarded (which is a factor expressly required by the BAT Rules to be considered), the Arbitrator makes the following decision.

59. Taking into account the factors required by Article 17.3 of the BAT Rules, the maximum amount prescribed under Article 17.4 of the BAT Rules, and the specific circumstances of this case, the Arbitrator holds that EUR 3,000.00 represents a fair and equitable contribution by Club to Player 1's reasonable legal fees and other expenses, and that EUR 3,000.00 represents a fair and equitable contribution by Club to Player 2's

reasonable legal fees and other expenses. In addition to these sums the Arbitrator awards Claimants EUR 5,000.00 arising from the payment of the non-reimbursable handling fee. They had to bring this arbitration in order to secure their claims. The total amount awarded to Claimants is therefore EUR 11,000.00.

60. The Arbitrator decides that in application of Article 17.3 of the BAT Rules:

(i) Club shall pay EUR 8,000.00 to Claimants, being the costs advanced by them.

(ii) Club shall pay EUR 11,000.00 to Claimants, representing a contribution by it to their reasonable legal fees and other expenses.

8. AWARD

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

1. **Galatasaray Spor Kulübü Dernegi shall pay Mr. Vladimir Micov EUR 90,000.00, net, by way of compensation for unpaid salary, together with interest at 5% per annum from 16 June 2017 until payment.**

2. **Galatasaray Spor Kulübü Dernegi shall pay Mr. Jon Diebler USD 78,219.47, net, by way of compensation for unpaid salary, together with interest at 5% per annum from 16 June 2017 until payment.**

3. **Galatasaray Spor Kulübü Dernegi shall pay jointly to Mr. Vladimir Micov and Mr. Jon Diebler EUR 8,000.00 as reimbursement for their arbitration costs.**

4. **Galatasaray Spor Kulübü Dernegi shall pay jointly to Mr. Vladimir Micov and Mr. Jon Diebler EUR 11,000.00 as a contribution to their reasonable legal fees and other expenses.**

5. **Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 14 May 2018

Klaus Reichert

Arbitrator