

**ARBITRAL AWARD**

**(BAT 1318/18)**

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Clifford J. Hendel**

in the arbitration proceedings between

**Mr. Mathias Lessort,**

**- Claimant -**

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

vs.

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

**- Respondent -**

## **1. The Parties**

### **1.1 The Claimant**

1. Mr. Mathias Lessort (the "Player") is a French professional basketball player.

### **1.2 The Respondent**

2. Basketball Club Crvena Zvezda (the "Club", and together with the Player the "Parties") is a professional basketball club competing in the Serbian professional basketball league.

## **2. The Arbitrator**

3. On 21 December 2018, Prof. Richard McLaren, O.C. the President of the Basketball Arbitral Tribunal (the "BAT") appointed Mr. Clifford J. Hendel 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 his declaration of independence.

## **3. Facts and Proceedings**

### **3.1 Summary of the Dispute**

4. On 8 August 2017, the Player and the Club entered into an agreement whereby the latter engaged the Player for the 2017/2018, 2018/2019 and 2019/2020 seasons (the "Agreement").

5. On 21 August 2017, the Parties concluded an Annex to the Agreement.
6. The Agreement provided for the Player to receive an annual base salary of EUR 250,000.00 net for the 2017/2018 season, EUR 300,000.00 net for the 2018/2019 season and EUR 350,000.00 net for the 2019/2020 season. The Agreement (as supplemented by the Annex) provided for each season's salary to be paid in 10 equal monthly instalments on the dates specified therein.
7. Article 3 e) of the Agreement provides that:

*"The Club shall be bound to pay following bonuses to the Player:*

  - *Winning Cup in Serbia amount of 1.500 EURO*
  - *Winning Championship in Serbia amount of 2.500 EURO*
  - *Winning ABA league 5.000 EURO*
  - *Reaching Top 8 of Euro league 10.000 EURO*
  - *Reaching Final 4 of Euro league 20.000 EURO*

*The bonuses will be paid to the player, within 15 days from the last game of the club playing season.*

*All the bonuses are net and cumulative, and same for all playing seasons".*
8. On 31 July 2018, the Parties entered into a contract for the early termination of the Agreement. In clause 3 of that contract, it was established that *"the Club shall pay to the Player amount of 102.500,00 EUR (one hundred two thousand five hundred) which is debt from the basketball season 2017/18"*.
9. This is exactly the amount that the Player now seeks as unpaid salaries for that season.

### 3.2 The Proceedings before the BAT

10. On 7 December 2018, the Claimant filed a Request for Arbitration in accordance with the BAT Rules and duly paid the non-reimbursable handling fee of EUR 3,000.00 on that same date.
11. On 7 January 2019, the BAT informed the parties that Mr. Clifford J. Hendel had been appointed on 21 December 2018 as the Arbitrator in this matter, invited the Respondent to submit its Answer by 28 January 2019 and fixed the advance on costs to be paid by the Parties as follows:

<i>"Claimant (Mr. Mathias Lessort)</i>	<i>€ 4,000.00</i>
<i>Respondent (Basketball Club Crvena Zvezda)</i>	<i>€ 4,000.00"</i>

12. On 4 February 2019, after his request for a 15-day extension to effect such payment was granted, the Claimant paid his part of the foregoing advance on costs. In light of the Respondent's failure to timely pay its part of the advance on costs, and after being invited by the BAT on 13 February 2019 to make such payment on behalf of the Respondent, the Claimant made such payment in substitution on 26 February 2019.
13. By Procedural Order of 6 March 2019, the Arbitrator invited the Claimant to (i) clarify which payments constituted the requested amount of EUR 102,500.00; (ii) submit any communications exchanged between the Claimant and the Club about the debt; and (iii) inform whether the Claimant continued with the Club this year (2018/2019) - providing explanation or evidence of the early termination of the Agreement if it was not the case-.
14. Also on 6 March 2019, the Claimant replied to the Procedural Order by sending an e-mail in which he stated the following:

*"Here are the answers of the Claimant:*

*1. Amount of 102.500 EUR consists of 4 unpaid salaries (4x 25.000 EUR) from season 2017/19 and Bonus of 2.500 EUR for winning Serbian Championship.*

*2. 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 so the most of the communication between them and the agent is in direct talk in offices or by phone, so there is no record in written for that communications.*

*3. Agreement was terminated after season 2017/18; in attachment is the Agreement for early termination of the contract".*

15. On 13 March 2019, the BAT invited the Respondent to file its comments to the Claimant's last submission by 21 March 2019. The Respondent failed to do so.
16. On 25 March 2019, the Arbitrator declared the exchange of documents completed in accordance with Article 12.1 of the BAT Rules and invited the parties to indicate (by no later than 1 April 2019) how much of the applicable maximum contribution to costs should be awarded to them and why, including a detailed account of their costs and any supporting documentation in relation thereto.
17. The Claimant filed his costs submission on 25 March 2019. The Respondent failed to file a costs submission.

#### **4. The Positions of the Parties**

##### **4.1 The Claimant's Position**

18. In his Request for Arbitration, the Claimant requested the following relief:

*"a) To award claimant Mathias Lessort with amount of 102.500 EUR (one hundred two thousand five hundred) and additionally to award claimant's interest at the applicable Swiss statutory rate, starting from 26<sup>th</sup> of June 2018.*

*b) To award claimant with the full covered costs of this Arbitration and Legal fees and expenses...”*

#### **4.2 Respondent's Position**

19. The Respondent has not participated in this proceeding, but has been duly notified of its existence and has received copies of all submission of the Claimant and all communications of the BAT.

#### **5. The jurisdiction of the BAT**

20. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Respondent did not participate in the arbitration), he will examine his jurisdiction *ex officio*, on the basis of the record as it stands.<sup>1</sup>
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

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<sup>1</sup> ATF 120 II 155, 162.

arbitrable within the meaning of Article 177(1) PILA<sup>2</sup>.

24. The jurisdiction of the BAT over the dispute results from the arbitration clause contained under article 6 of the Agreement, which reads as follows:

*“Any dispute arising from or related to the present contract 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 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 and CAS upon appeal shall decide the dispute ex aequo et bono”.*

25. The Agreement is in written form and thus the arbitration agreement fulfills 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 agreement under Swiss law (referred to by Article 178(2) PILA).
27. The jurisdiction of BAT over the Player’s claim arises from the Agreement. The wording “[a]ny dispute arising from or related to the present contract [...]” clearly covers the present dispute.
28. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Claimant’s claim.

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<sup>2</sup> Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.



## **6. Other Procedural Issues**

29. 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.<sup>3</sup> However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.
30. 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 Claimants’ Request for Arbitration, and to their Account on Costs. Respondent, however, chose not to participate in this Arbitration.

## **7. Discussion**

### **7.1 Applicable Law – ex aequo et bono**

31. 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:

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<sup>3</sup> See *ex multis* BAT cases 0001/07; 0018/08; 0093/09; 0170/11.



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

32. 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."*

33. Article 6 of the Agreement provides that: *"[t]he arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono"*.

34. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in this proceeding.

35. 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<sup>4</sup> (Concordat)<sup>5</sup>, 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."*<sup>6</sup>

36. 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".

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

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<sup>4</sup> 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). .

<sup>5</sup> P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

<sup>6</sup> JdT 1981 III, p. 93 (free translation).

## **7.2 Findings**

### **7.2.1 Salary Payments for the 2017-2018 Season**

38. The central issue in discussion is the unpaid salary and bonus regarding the 2017-2018 season, which amounted as per the Claimant's Request for Arbitration to EUR 102,500.00.
39. The latter was not only included in the Agreement, but also in a contract (containing a BAT jurisdiction clause identical to that in the Agreement itself) for the early termination of the Agreement entered into on 31 July 2018 by the Player and the Club and submitted by the Player in response to the Procedural Order issued on 9 March 2019.
40. The Respondent not having participated in this proceeding, it is not disputed and appears indisputable that the requested amount of salary is due and owing by the Club.
41. Therefore, the Arbitrator finds it fair and reasonable to award the EUR 102,500.00 net to the Player.

### **7.2.2 Interest**

42. As noted above, the Claimant has requested interest on the principal amounts claimed "*at the applicable Swiss statutory rate*". In accordance with consistent BAT jurisprudence and deciding *ex aequo et bono*, the Arbitrator considers it fair and reasonable to award interest at the rate of 5% per annum on the EUR 102,500.00 found above to be due and owing as unpaid salary.
43. As for the time when such interest should accrue, the Arbitrator considers it fair and reasonable that interest should commence on the date requested by the Claimant, 26 June 2018, i.e. on the day after the contractually established due date for payment.

## 8. Costs

44. Article 17.2 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.
45. On 27 April 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 “*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 4,375.00.
46. Considering that the Claimant was the prevailing party in this arbitration, it is consistent with the provisions of the BAT Rules that the fees and costs of the arbitration, as well as his reasonable costs and expenses, be borne by the Club.
47. The Claimant claims legal fees in the amount of EUR 10,000.00. He also claims for the expense of the non-reimbursable handling fee.
48. Taking into account the factors required by Article 17.3 of the BAT Rules, the provision in the arbitration agreements as regards costs, the maximum awardable amount prescribed under Article 17.4 of the BAT Rules (in this case, EUR 10,000.00), the fact that the non-reimbursable handling fee in this case was EUR 3,000.00, and the specific circumstances of this case, the Arbitrator holds that a total of EUR 6,000.00 represents

a fair and equitable contribution by the Respondent to the Claimant in this regard. In particular, the Claimant only had to make one substantive submission on the merits of this case, as the Respondent has not intervened in the proceeding. The Request for Arbitration was a straightforward document, and the underlying facts and documentation in this case had little complexity.

49. Given that the Claimant paid advances on costs of EUR 8,000.00 as well as a non-reimbursable handling fee of EUR 3,000.00 (which will be taken into account when determining the Claimant's legal fees and expenses), the Arbitrator decides that in application of Article 17.3 of the BAT Rules:
- (i) BAT shall reimburse EUR 3,625.00 to the Claimant, being the difference between the costs advanced by him and the arbitration costs fixed by the BAT President;
  - (ii) The Club shall pay EUR 4,375.00 to the Claimant, being the difference between the costs advanced by him and the amount he is going to receive in reimbursement from the BAT; and
  - (iii) The Club shall pay to the Claimant EUR 6,000.00 (EUR 3,000.00 for the non-reimbursable fee + EUR 3,000.00 for legal fees), representing the amount of his legal fees and other expenses.

## **9. AWARD**

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

- 1. Basketball Club Crvena Zvezda shall pay Mr. Mathias Lessort a total amount of EUR 102,500.00 net, as compensation for unpaid salaries, plus interest at 5% per annum on such amount, commencing on 26 June 2018, until payment.**
- 2. Basketball Club Crvena Zvezda shall pay Mr. Mathias Lessort an amount of EUR 4,375.00 as reimbursement for his arbitration costs.**
- 3. Basketball Club Crvena Zvezda shall pay Mr. Mathias Lessort an amount of EUR 6,000.00 as reimbursement for his legal fees and expenses.**
- 4. Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 7 May 2019.

Clifford J. Hendel  
(Arbitrator)