BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 1262/18)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Ms. Annett Rombach

in the arbitration proceedings between

Mr. Dusko Vujosevic

- Claimant -

represented by Mr. Giuseppe Cassi, Via Archimede 18, 97100 Ragusa, Italy

vs.

Basketball Club Partizan NIS
Humska 1, 11000 Belgrade, Serbia

- Respondent -

represented by Mr. Dejan Kijanović, Director General

1. The Parties

1.1 The Claimant

1. Mr. Dusko Vujosevic (the “Coach” or “Claimant”) is a professional basketball coach who has been under contract with Respondent for the basketball seasons 2012-13, 2013-14, and 2014-15.

1.2 The Respondent

2. Basketball Club Partizan NIS (the “Club” or “Respondent”, and together with Claimant the “Parties”) is a professional basketball club located in Belgrade, Serbia.

2. The Arbitrator

3. On 10 October 2018, Prof. Dr. Ulrich Haas, the Vice-President of the Basketball Arbitral Tribunal (the "BAT"), appointed Ms. Annett Rombach as arbitrator (the “Arbitrator”) pursuant to Articles 0.4 and 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. Between 2012 and 2015, the Coach was engaged as a professional basketball coach at Respondent under different employment contracts.

5. On 11 September 2015, after the expiry of their professional relationship, the Parties signed an agreement (the “Agreement”), pursuant to which the Club confirmed that it

owed the Coach a total of EUR 529,705.00 in respect of his coaching services over the preceding three seasons (Article 1 of the Agreement). Article 2 of the Agreement set out a schedule of payments starting on 30 September 2015 (EUR 150,000.00) and running through 1 September each year (2016 to 2019 inclusive) with further annual installments (EUR 50,000.00, EUR 50,000.00, EUR 150,000.00, and EUR 129,705.00) to be paid by the respective due dates. The amounts were to be paid net in Dinars (RSD) at the median exchange rate of the Bank of Serbia on the date of payment.

6. The Club paid the first instalment due on 30 September 2015. It did not pay the instalments which fell due on 1 September 2016 and 1 September 2017 (2x EUR 50,000), whereupon the Coach initiated BAT arbitration. By arbitral award dated 18 December 2017, the BAT arbitrator granted the Coach's claims and awarded him payment of the two instalments in a total amount of EUR 100,000 (BAT Award 1037/17). Enforcement proceedings before FIBA are still pending at this time with respect to the collection of the full amounts awarded in BAT 1037/17.

7. The Club has also failed to pay the instalment which fell due on 1 September 2018 (EUR 150,000.00). This amount is at issue in the present arbitration proceeding.

3.2 The Proceedings before the BAT

8. On 26 September 2018, the Claimant filed a Request for Arbitration (dated 17 September 2018) together with several exhibits in accordance with the BAT Rules. The non-reimbursable handling fee of EUR 3,000.00 had been received in the BAT bank account already on 13 September 2018.

9. On 17 October 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 7 November 2018 (the

"Answer"), and fixed the amount of the Advance on Costs to be paid by the Parties by no later than 29 October 2018 as follows:

"Claimant (Mr. Dusko Vujosevic) EUR 4,500.00
Respondent (BC Partizan NIS) EUR 4,500.00"

10. On 16 November 2018, after having been granted an extension by the Arbitrator, Respondent filed its Answer.

11. On 19 November 2017, BAT acknowledged receipt of Claimant's share of the Advance on Costs as well as Respondent's Answer. Because of Respondent's failure to pay its share, in accordance with Article 9.3 of the BAT Rules, Claimant was invited to substitute for Respondent's share until 29 November 2018 for the arbitration to proceed.

12. On 5 December 2018, BAT noted that its prior correspondence had inadvertently not been sent to Claimant. It fixed a new time limit for the payment of Respondent's share of the Advance on Costs until 17 December 2018.

13. On 7 January 2019, BAT acknowledged receipt of the full Advance on Costs, with Claimant having substituted for Respondent's share. Claimant was invited to comment on Respondent's Answer by no later than 21 January 2019 (the "Reply").

14. On 21 January 2019, Claimant filed his Reply and Respondent was invited to comment on Claimant's Reply by no later than 4 February 2019 (the "Rejoinder"). Respondent did not take advantage of this right.

15. On 21 February 2019, 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 cost accounts by 28 February 2019.

16. On 28 February 2019, Claimant submitted his statement of costs. Respondent did not file any cost account.

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

4. The Positions of the Parties

4.1 Claimant's Position and Request for Relief

18. Claimant submits that Respondent has failed to pay the September 2018 installment of the compensation promised to him under the Agreement. The counterclaims submitted by Respondent in support of its request to dismiss the Claimant's claims are baseless and must be rejected for numerous reasons, which can be summarized as follows:

- The Coach never received the two bonuses the Club alleges to have paid to him in 2008. The Coach is also unaware of the two decisions by the Club's Board of Directors submitted into evidence with Respondent's Answer, which were the alleged (faulty) basis for the bonus payments.

- Respondent's claims have been introduced into the arbitration in the wrong form. Respondent should have filed a counterclaim in accordance with Article 11.2 of the BAT Rules, because he tries to introduce an unrelated claim that has no connection with the main claims pursued by the Coach.

- Furthermore, Claimant invokes the principle of *Verwirkung*, arguing that Respondent should not be allowed to pursue claims which allegedly arose more than 10 years ago.

19. Claimant requests the following relief:

> *"1. to declare his right to receive from the Respondent, the amount of Euros 150,000.00 (Euros one hundred and fifty thousand) net of all taxes and social insurance as installment expired last 1st September 2018; 2. to order Respondent to pay this amount plus the interests (5% per year), and all costs involved (legal expenses, BAT fee etc)."*

4.2 Respondent's Position and Request for Relief

20. Respondent does not dispute the Claimant's claims, but instead alleges that the Claimant, in the year 2008, wrongfully received two bonus payments (totaling EUR 200,000.00) for the Club's winning of the 2008 Radivoj Korac Cup, and its winning of the 2007-08 Serbian Championship. The Club purports that the Coach has a legal obligation to return these wrongfully received bonuses, and that, as a result of his re-payment duty, there are "*no outstanding payments*" by it vis-á-vis the Coach. More specifically, Respondent maintains that no legal basis existed for the payment of the relevant bonuses. It submits two decisions allegedly rendered at the time by its Board of Directors (signed by the former President on behalf of the Club) and invokes several formal and substantive reasons why such decisions have been made on a faulty basis and why the Claimant, as a result, has to return these monies.

21. Respondent does not submit any specific request for relief. It can, however, be deducted from the Answer that Respondent seeks the dismissal of Claimant's claims.

5. The Jurisdiction of the BAT

22. 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").

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

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

25. The Agreement contains the following dispute resolution clause in favor of BAT (Article 3):

> *"In case of any disputes the parties shall recognize competence and accept arbitration by BAT (Basketball Arbitral Tribunal) in Geneva, which shall come to a decision through arbitration procedure conducted by a single arbitrator appointed by the Arbitration President. The procedure shall be conducted in the English Language in accordance with the provisions of the BAT Arbitration Rules and the final decision shall be passed in accordance with the legal principle ex aequo et bono."*

26. This arbitration clause is in written form and thus fulfills the formal requirements of Article 178(1) PILA.

27. 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). Furthermore, Respondent, which participated in the arbitration, has not disputed BAT's jurisdiction.

28. Hence, the Arbitrator has jurisdiction to decide the present dispute.

6. Admissibility of the claims invoked by Respondent

29. Respondent's only defense in this proceeding is that it is entitled to reimbursement of two bonuses it wrongfully paid to Claimant in 2008, and that – as a result – there are "*no outstanding payments*" vis-à-vis the Coach. Claimant argues that Respondent should

have introduced these claims by means of a counterclaim within the meaning of Article 11.2 of the BAT Rules.

30. Respondent has not identified the legal form of its defense, which, therefore, needs to be determined on the basis of an interpretation of Respondent's submissions. The Arbitrator finds that the Respondent's defense does not qualify as a counterclaim within the meaning of Article 11.2 of the BAT Rules, because Respondent neither introduced any (express) request for relief in respect of the invoked claims, nor does it (not even impliedly) seek a separate payment award, despite the fact that its alleged refund claims largely exceed the main claim introduced by the Coach. Rather, Respondent's submissions indicate that the alleged refund claims are used as a mere defense in support of a full dismissal of Claimant's claims. Accordingly, Respondent's defense qualifies as a set-off, not as a counterclaim.

31. Claimant argues that because the alleged refund claims have no connection with the main claim, the only correct form for their introduction would have been through the instrument of a counterclaim. The Arbitrator disagrees. Under the applicable Swiss *lex arbitri*, parties are well allowed to introduce defenses (including set-off claims) even if they fall outside the ambit of the parties' arbitration agreement.[1] In this respect, the Swiss Federal Tribunal refers to the statutory situation for domestic arbitration. Article 377 (1) of the Swiss Code of Civil Procedure (CCP), provides that "[t]he arbitral tribunal has jurisdiction over a set-off defense irrespective of whether the claim on which the set-off is said to be based is covered by the arbitration agreement, another arbitration agreement or a forum-selection agreement."[2] The purpose of this provision, which is to enhance the efficiency of arbitration, must apply, *a fortiori*, in an international context.

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[1] Swiss Federal Tribunal (SFT), decision dated 7 February 2011, 4 A_482/2010, ASA Bulletin 2011, 721, 725; SFT, decision dated 9 November 2010, 4A_428/2010, ASA Bulletin 2011, 931, 933.

[2] Translation provided in *Kaufmann-Kohler/Rigozzi*, International Arbitration (2015), para 3.149 (Fn. 235).

32. Hence, the introduction of Respondent's alleged reimbursement claims as a set-off defense is admissible, and the Arbitrator has jurisdiction to decide over such defense.

7. Applicable Law – *ex aequo et bono*

33. 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".*

34. 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."*

35. In Article 3 of the Agreement, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono* without reference to any other law. Consequently, the Arbitrator will decide the issues submitted to her in this proceeding *ex aequo et bono*.

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

8. Findings

8.1 Claimant's Payment Claim

37. As a starting point, the Arbitrator notes that it is undisputed that the amounts claimed by the Coach in this arbitration have not been paid by Respondent. There is also no reason on file which could cast doubt on the validity of the Agreement or on the Respondent's obligation to pay the amounts stipulated thereunder. Respondent has also not invoked any such reason. Accordingly, the Arbitrator finds that Claimant is principally entitled to receive the requested payment of EUR 150,000.00 as provided for in the Agreement.

8.2 Respondent's Set-off Claim

38. The only defense on which Respondent relies is an alleged claim for the reimbursement of two bonuses in the amount of 2x EUR 100.000,00, which were allegedly paid to the Coach in 2008, after the Club won the Korac Cup and the Serbian Championship. In this arbitration, the Club has introduced various explanations as to why the decisions taken by the Club's Board of Management in respect of these bonuses were unlawful and irregular and entitle it to claim a refund of the relevant bonus amounts.

39. Claimant, on the other hand, argues that he has not received any bonuses from the Club relating to the Club's 2008 titles, and that he is unaware of the decisions mentioned by the Club. Claimant further invokes the doctrine of *Verwirkung*, arguing that Respondent is estopped from claiming a payment the basis of which was created more than 10 years ago.

40. Based on the record before her, the Arbitrator finds that Respondent has failed to establish the existence of the alleged set-off claims (below at 8.2.1), and that – even if such claims were existent – Respondent would be barred from using such claims as a defense under the theory of *Verwirkung* (below at 8.2.2).

8.2.1 Respondent has failed to establish the basis of its set-off claim

41. Respondent alleges that it paid two bonuses to Claimant in the amount of 2x EUR 100,000.00. Claimant disputes that he received these amounts. Respondent has not proffered any evidence (bank statements, payment receipts, correspondence etc.) in support of its allegations. Specifically, Respondent was invited to submit a Rejoinder on Claimant's Reply, in which Claimant had disputed receipt of the bonuses. Respondent did not take advantage of this right. What is also curious is that Respondent apparently raised the alleged reimbursement claims for the first time in this arbitration, while it did not do so in the previous proceeding BAT 1037/17, which relates to the same Agreement. As a result, there is no indication, let alone any proof, that the alleged bonus payments have indeed been made by the Respondent. Accordingly, Respondent has failed to prove the very basis of its set-off claims, which means that its respective defense must fail already for this reason.

8.2.2 *In the alternative*: Respondent is barred from the invocation of the set-off under the doctrine of *Verwirkung*

42. The events Respondent refers to as the basis for its set-off claims date back to the year 2008. In other words, these events happened more than ten years before the initiation of the present arbitration, in which Respondent – apparently for the very first time – introduced these claims as a defense against Claimant's salary payment claims. Claimant argues that Respondent is barred from relying on these claims as a defense under the well-established doctrine of *Verwirkung*, which forms an integral part of BAT's jurisprudence.[3]

[3] See, e.g., BAT 0581, 0879, 1082.

43. The principle of *Verwirkung* forms the primary basis for BAT arbitrators to analyze whether claims that are at issue in a BAT arbitration have been filed in a timely manner under the applicable legal framework of *ex aequo et bono*. The doctrine of *Verwirkung* does not only apply to the claims pursued by the claiming party, but also to claims used as a defense in a set-off scenario by the responding party. There is no reason to relieve a claim-holder from his obligation to collect claims in a timely manner simply because he uses such claims as a defense rather than pursuing them pro-actively.

44. *Verwirkung* is rooted in the principle of legal certainty, which requires that any payment must be claimed within a reasonable period of time after it has become due.[4] This also applies to claims by an employee against his employer. While the question of whether a claimant is estopped from collecting his debts must be determined on a case-by-case basis, BAT arbitrators apply two criteria as guidelines for their analysis: *Verwirkung* may be assumed when (1) a substantial period of time has elapsed since the concerned claim fell due and (2) the debtor has reasonable grounds to rely on the assumption that the creditor will not exercise his right in the future.[5] The longer the period of time which has elapsed is, the easier it should (principally) be for the debtor to show that he justifiably relied on the creditor's waiver of his claims. *Verwirkung* was assumed, for example, in cases involving three[6] or five[7] years of inactivity on the claimant's part.

45. In the present case, a rather significant period of ten years has elapsed with respect to the set-off claims. The Arbitrator is of the opinion that the expiry of this extraordinarily long time period in itself constitutes a very strong presumption that Respondent's claims are time-barred under the doctrine of *Verwirkung*. In fact, the Arbitrator has good

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4 BAT 0777, 1082.

5 BAT 0581, 0879.

6 BAT 0581; BAT 0879.

7 BAT 0777.

indications that under the statute of limitation provisions of national laws which have a connection with this case – Serbian law and Swiss law – the claims at issue would long be time-barred.[8] Although national statutes of limitation are principally inapplicable in BAT arbitrations, there is no reason for a creditor to benefit from significantly longer limitation periods under *ex aequo et bono* principles than he would enjoy under the relevant laws which could possibly apply to this case in the absence of the Parties' choice of law.

46. Moreover, the Club has not offered any facts as to why the Coach could not have relied on the assumption that the Club would not pursue its alleged refund claims in the future. The Club never requested re-payment of the bonuses before. To the contrary, the Club expressly admitted that its alleged claim for reimbursement was only detected very recently upon the new management's complete review of the Club's legal relationship with the Coach. However, the fact that the Club itself had (allegedly) no knowledge of its (alleged) right for reimbursement of the disputed bonuses until very recently does not justify the Club's inactivity. It is the Club's own responsibility to legally analyze potential claims within a reasonable time after the termination of its employment relationships with players and coaches. The employer cannot wait for an arbitrarily long time period to review potential claims against its former employees. It is for this very reason that in many legal environments, strict cut-off periods exist for the (judicial) enforcement of employment-related claims. In any event, the Coach had a justified expectation that the Club would not defend itself with claims dating back ten years, when such claims have never been addressed before.

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8 In Serbia, the relevant statute of limitation period is 3 years (Article 198 of the Serbian Labour Law, Official Herald of the Republic of Serbia Nos. 24/2005, 61/2005 and 54/2009). In Switzerland, the relevant limitation period is 5 years (Art. 128 No. 3 of the Federal Act on the Amendment of the Swiss Civil Code (Part Five: Code of Obligations)).

47. As a result, the Arbitrator finds that Respondent is precluded from setting-off the alleged reimbursement claims under the doctrine of *Verwirkung*.

8.3 Interest

48. Claimant requests the payment of interest of 5% per annum, without specifying the starting date for the interest payments.

49. The Agreement does not provide for any obligation by the Club to pay interest in case of a non-payment. However, it is a generally accepted principle embodied in most legal systems and reflected in the BAT jurisprudence,[9] that default interest can be awarded even if the underlying agreement does not explicitly provide for a respective obligation. The Arbitrator, deciding *ex aequo et bono* and in accordance with constant BAT jurisprudence, considers that the requested interest rate of 5% per annum is fair and just to avoid that the Club derives any profit from the non-fulfillment of its obligations.

50. With respect to the starting date, it is appropriate to have interest run as of the day after the outstanding payment became due, i.e. as of 2 September 2018.

8.4 Summary

51. The Coach is entitled to receive the equivalent amount in Dinars (RSD) of EUR 150,000.00 (based on the median exchange rate of the National Bank of Serbia as of 1 September 2018), together with interest at 5% per annum on that amount from 2 September 2018 until payment.

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[9] See, ex multis, the following BAT awards: 0092, Ronci, Coelho vs. WBC Mizo Pecs 2010; 0069,Ivezic, Draskicevic vs. Basketball Club Pecsi Noi Kosariabda Kft; 0056, Branzova vs. Basketball Club Nadezhda); 0237, Ivanovic, GPK Sports Management Limited vs. Kolossos Rhodes Basketball Club.

9. Costs

52. 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.

53. On 15 May 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"; 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 – 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 6,562.50.

54. Considering that Claimant entirely prevailed with his requests in the present arbitration, it is consistent with the provisions of the BAT Rules that 100% of the arbitration costs, as well as 100% of Claimant's reasonable legal fees and other expenses, be borne by Respondent. Of specific relevance in this regard is an aspect of Article 17.3 of the BAT Rules ("[W]*hen deciding on the arbitration costs and on the parties' reasonable legal fees and expenses, the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and the financial resources of the parties*").

55. In light of these principles, the Arbitrator decides that in application of Article 17.3 of the BAT Rules:

- Respondent shall pay EUR 6,562.50 to Claimant, being the amount of the arbitration costs determined by the BAT Vice-President;

- The BAT shall reimburse Claimant the amount of EUR 2,437.50, being the difference between the amount of the arbitration costs advanced by him and the reimbursement to be received from Respondent;

- Respondent shall pay EUR 4,000.00 to Claimant as a contribution towards his attorneys' fees and EUR 3,000.00 as a reimbursement for the handling fee. The Arbitrator finds that the amount of EUR 10,000.00, for which Claimant requested reimbursement in his statement of costs, is excessive under the circumstances. The main claim is rather simple and undisputed. The Request for Arbitration was short and Claimant's Reply to the Club's defense was only 2 pages long. The Club's defense was not very sophisticated and did not require the effort which the rather high amount in attorneys' fees suggests it took.

10. AWARD

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

1. **Basketball Club Partizan NIS shall pay Mr. Dusko Vujosevic as unpaid compensation the equivalent amount in Dinars (RSD) of EUR 150,000.00 (net) based on the median exchange rate of the National Bank of Serbia as of 1 September 2018 together with interest at 5% per annum on that amount from 2 September 2018 until payment.**

2. **The costs of this arbitration until the present Award, which were determined by the Vice-President of the BAT to be in the amount of EUR 6,562.50, shall be borne by Basketball Club Partizan NIS alone. Accordingly, Basketball Club Partizan NIS shall pay EUR 6,562.50 to Mr. Dusko Vujosevic. The balance of the Advance on Costs, in the amount of EUR 2,437.50, will be reimbursed to Mr. Dusko Vujosevic by the BAT.**

3. **Basketball Club Partizan NIS shall pay Mr. Dusko Vujosevic EUR 7,000.00 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, 20 May 2019

Annett Rombach

(Arbitrator)