

ARBITRAL AWARD

(BAT 1124/17)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Ms. Annett Rombach

in the arbitration proceedings between

Mr. Tomislav Zubcic

- Claimant 1 -

Bill A. Duffy International Inc.

507 N. Gertruda Ave., Redondo Beach, CA 90227, USA

- Claimant 2 -

both represented by Mr. Billy J. Kuenziger, attorney at law,
1601 I St., 5th floor, Modesto, CA 95354, USA

vs.

Trabzonspor Basketball Kulubu Dernegi

Mehmet Ali Yilmaz Tesisleri Ahmet Suat Özyazici Cad.
Havalimani Altı, 61830 Trabzon, Turkey

- Respondent -

1. The Parties

1.1 The Claimants

1. Mr. Tomislav Zubcic (the "Player" or "Claimant 1") is a professional basketball player of Croatian nationality.
2. Bill A. Duffy International Inc. (the "Agency" or "Claimant 2", and together with Claimant 1 the "Claimants") is a basketball agency which represented the Player leading to his retainer by Respondent.

1.2 The Respondent

3. Trabzonspor Basketball Kulubu Dernegi (the "Club" or "Respondent", and together with Claimants the "Parties") is a professional basketball club located in Trabzon, Turkey.

2. The Arbitrator

4. On 13 December 2017, Prof. Richard H. McLaren O.C., 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"). None 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

5. On 28 July 2017, the Player, the Agency and the Club entered into a contract (the "Player Contract"), pursuant to which the Club engaged the Player as a professional

basketball player for the 2017-18 season. Pursuant to Clause 2.1 of the Player Contract, the Player was promised a total base salary of USD 215,000.00 net, payable in 10 equal instalments of USD 21,500.00 on the 1st day of each month, starting in September 2017 and ending in May 2018. All payments were fully and unconditionally guaranteed against, *inter alia*, death, injury, and lack of skill (Clause 4.1 Player Contract).

6. Clause 10 of the Player Contract equipped the Player with the following rights in case of a payment delinquency:

"[...] In the event that any scheduled payments are not made by the Club within 30 days of the applicable payment date, the Player's performance obligations shall cease, Player shall have the right, at the Player's option, to terminate this Agreement and accelerate all future payments required under this Agreement [...]."

The Club agrees that the PLAYER may terminate this agreement in the event that:

[...] Any payment mentioned by this contract is past due more than thirty (30) days, [...]

In such either case [...], PLAYER can terminate this AGREEMENT and he will be granted his unconditional release and free agency to play in any club in the world he wishes, without any further payment obligations or duties to the Club, and all monies due to the PLAYER and or the REPRESENTATIVE during the entire term of his agreement shall become immediately due and payable. PLAYER is under no obligation to mitigate his damages and CLUB shall receive no offset."

7. Furthermore, the Club undertook to pay the Agency a commission fee of 10% of the Player's total salary, per Clause 5.1.1. of the Player Contract. According to a separate agency fee agreement signed between the Agency and the Club on the same day as the Player Contract (the "Agency Agreement"), the commission fee was payable on 1 September 2017 (Clause 2 A. of the Agency Agreement).

8. In mid-October 2017, Respondent came to the conclusion that the Player was not the right fit for the team. Therefore, on 19 October 2017, Respondent's General Manager asked the Agency to assist it in finding a solution for the transfer of the Player to another Club. The Club sent several notices to the Player prohibiting him from practicing with the team and from participating at games between 16 and 31 October 2017.
9. On 24 October 2017, the Player's counsel send an e-mail to Respondent, insisting that independent from the Agency's efforts to move the Player away from the Club, the Player had a fully-guaranteed contract and was entitled to the due salary payments stipulated thereunder. Subsequently, the Parties entered into settlement discussions with a view to terminate the Player's employment by mutual agreement, against payment of one final settlement sum.
10. On 7 November 2017, the Agency sent a written settlement proposal to Respondent, pursuant to which the Player was prepared to agree to a premature termination of his employment against payment of a total sum of USD 107,500.00 (payable in three instalments). The Club, on the same day, proposed to pay the Player USD 86,000.00. Further negotiations took place between the Agency and the Club via WhatsApp, but no settlement could be reached.
11. On 9 November 2017, the Player's counsel sent a letter to the Club notifying the latter of the immediate termination of the Player Contract (the "Termination Letter"), and requesting payment of the entire salary provided for under the contract. The Player left the Club on 10 November 2017.
12. On 17 November 2017, the Player signed an employment contract with the German club BonBas GmbH (the "New Contract"), pursuant to which the Player was to receive a total net salary of EUR 40,000.00 for the remainder of the season.

3.2 The Proceedings before the BAT

13. On 29 November 2017, the Claimants filed a Request for Arbitration together with several exhibits (received by the BAT Secretariat on 30 November 2017) in accordance with the BAT Rules. The non-reimbursable handling fee of EUR 3,000 was received in the BAT bank account on 30 November 2017.

14. On 22 December 2017, 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 12 January 2018 (the “Answer”), and fixed the amount of the Advance on Costs to be paid by the Parties as follows:

<i>“Claimant 1 (Mr. Tomislav Zubcic)</i>	<i>EUR 4,500.00</i>
<i>Claimant 2 (Bill A Duffy International, Inc.)</i>	<i>EUR 1,000.00</i>
<i>Respondent (Trabzonspor Basketbol Kulübü Derneği)</i>	<i>EUR 5,500.00”</i>

15. On 15 January 2018, because all Parties failed to pay their respective shares of the Advance on Costs, BAT fixed a final time limit for the Parties to make their respective payments. It further noted Respondent’s failure to submit the Answer, and granted Respondent a final opportunity to file the Answer by 22 January 2018.

16. On 23 January 2018, BAT acknowledged receipt of Claimants’ share of the Advance on Costs. Because of Respondent’s failure to pay its share, in accordance with Article 9.3 of the BAT Rules, Claimants were invited to substitute for Respondent’s share for the arbitration to proceed.

17. On 1 February 2018, BAT acknowledged receipt of the full Advance on Costs, with Claimants having substituted for Respondent’s share. Claimants were requested to submit a copy of the Agency Agreement. Claimants submitted the document to BAT on the same day.

18. On 5 February 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 cost accounts by 12 February 2018.
19. On 6 February 2018, Claimants submitted their statement of costs. Respondent did not file any cost account.
20. As none 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 Claimants' Position

21. Claimants submit that Respondent made only one partial salary payment to the Player in the amount of USD 19,450.00 (which is less than one monthly instalment). Despite the Player's insistence that he had a fully guaranteed contract, the Club did not make any further payments. The Player, therefore, was entitled to terminate the Player Contract with immediate effect.
22. Furthermore, the Club also failed to pay the agency fees.
23. The principle of damages mitigation does not apply in the present case, because, pursuant to Clause 10.1.3. of the Player Contract, the Parties agreed that no damages mitigation shall take place in case of a premature contract termination provoked by the Club's breach of contract.
24. Claimants request the following relief:

“The Respondent currently owes Claimant 1, Mr. Zubcic, the following:

- 1. \$195,550 USD for 2017/2018 season*

The Respondent currently owes the Claimant 2, Bill A. Duffy International, Inc. the following:

- 1. \$21,500 USD for 2017/2018 season*

For the Claimant, costs of this action plus attorney’s fees.”

4.2 Respondent's Position

25. Despite several reminders to do so, Respondent has not participated in this arbitration.

5. The Jurisdiction of the BAT

26. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Respondent did not participate in this arbitration, she will examine her jurisdiction *ex officio* on the basis of the record as it stands.
27. 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”).
28. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
29. 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.
30. The Player Contract (Clause 11) contains the following dispute resolution clause in favor of BAT:

“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 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. The arbitrator shall decide the dispute ex aequo et bono.”

31. The arbitration agreement is in written form and thus fulfills the formal requirements of Article 178(1) PILA.
32. 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). The arbitration clause covers both the Player's salary claims and the Agency's commission fee claim. Both claims arise directly out of the Player Contract.
33. Hence, the Arbitrator has jurisdiction to decide the present dispute.

6. Applicable Law – ex aequo et bono

34. 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”.

35. 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.”

36. In Clause 11 of the Player Contract, 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*.
37. In light of the foregoing considerations, the Arbitrator makes the findings below.

7. Findings

38. The central issue that must be resolved in deciding the present dispute is whether Claimants validly terminated the Player Contract on 9 November 2017 (below at 7.1) and which, if any, consequences the findings on the contract termination issue trigger with respect to the quantum of the claims presented here (below at 7.2).

7.1 Termination of the Player Contract

39. Claimants’ case rests on the premise that they validly terminated the Player Contract on 9 November 2017, and that based on such termination, they are entitled to the monetary compensation claimed in this arbitration. In this respect, Claimants rely on Clause 10 of the Player Contract, which provides that “[i]n the event any scheduled payments are not made by the Club within 30 days of the applicable payment date [...] Player shall have the right, at the Player’s option, to terminate this Agreement and accelerate all future payments required under this Agreement [...]”.
40. Claimants submit that when they terminated the Player Contract on 9 November 2017, Respondent had made only one payment of USD 19,450, despite the fact that three salary instalments of USD 21,500 each had fallen due on 1 September, 1 October and

1 November respectively. Accordingly, Respondent was late for more than 30 days with significant parts of the Player's salary, plus the agency fee.

41. The Arbitrator has no reason to doubt Claimants' presentation of the facts. Because proof of a negative fact (the non-payment) is a difficult concept, it would have been on Respondent to demonstrate which payments, if any, it made to Claimants. Respondent, however, did not participate in this arbitration. Hence, the Arbitrator relies on Claimants submissions, which are consistent and coherent.
42. The Arbitrator further finds that the Club had no valid excuse for its refusal to pay the Player and the Agency. The Player's exclusion from the team's practices and games as a result of the Club's dissatisfaction with his performance does not justify the non-payment. Pursuant to Clause 4.1 of the Player Contract, the contract guaranteed all payments to the Player irrespective of, *inter alia*, lack of skill. Therefore, based on the terms of the Player Contract and considerations of *ex aequo et bono*, which are in accordance with standard contractual practice in basketball, the Club had no right to retain salary payments because of its unhappiness with the Player's sporting performance.
43. In light of the valid termination of the Player Contract, the payment acceleration was triggered and the entire salary for the 2017-18 season became due on 9 November 2017.

7.2 Quantum of the Claimants' claims

44. Pursuant to Clause 10 of the Player Contract and as a result of the justified contract termination, Claimants are – in principle – entitled to all salary and agency fee payments promised by Respondent, which amount to USD 195,550.00 (215,000.00 total minus USD 19,450.00 already received) as salary for the Player, and USD 21,500.00 as agency fee.

45. The question arises whether any of these amounts must be reduced in accordance with BAT's well-established principles of damages mitigation, in light of the Player's execution of the New Contract. Under the New Contract, the Player was promised a salary of EUR 40,000.00 for the remainder of the 2017-18 season.
46. As a matter of principle, the law of damages as well as labor law principles dictate that any amounts a player earns or might earn by exercising reasonable care during the remaining term of the Player Contract must be deducted from the compensation owed by the party in breach.¹ However, Claimants are of the opinion that the principle of damage mitigation does not apply in the present case, because it was expressly excluded by the Parties in Clause 10 of the Player Contract:

"PLAYER is under no obligation to mitigate his damages and CLUB shall receive no offset."

47. BAT and CAS (upon appeal) had to assess the validity of this type of clause in the past.² The issue is whether the Arbitrator, under the applicable principles of *ex aequo et bono*, is allowed – or even required – to disregard a contractual agreement if it is considered intrinsically unfair or unjust.³ With specific reference to the clause at issue in this arbitration, the CAS has held that even if an arbitral tribunal decides *ex aequo et bono*, it may normally not derogate from the wording of a contract; it may, however, disregard an unnecessarily high and thus abusive penalty clause and reduce it to an acceptable level, or order an adaption of the contract.⁴

¹ This principle is also reflected frequently in BAT's jurisprudence.

² See BAT 421/13 and BAT 535/14. See also CAS Award 2014/A/3524 (appeal decision on BAT 421/13).

³ As done, e.g. in BAT 535/14.

⁴ CAS Award 2014/A/3524.

48. The Arbitrator agrees with these premises. It is supported by the predominant view of Swiss arbitration practitioners.⁵ It is not an arbitrator's mandate to replace the parties' express contractual arrangements by his or her own considerations of fairness and justice, unless the result of these arrangements would conflict with a hard limit, such as public policy.⁶ Thus, the Arbitrator's power to adjust, or even disregard, the parties' mutual consensus should be used with extreme caution, and limited to cases where the honoring of the parties' contractual agreement would expose the award to the risk of annulment or unenforceability.
49. The present case does not require any interference with the Parties' arrangements. The Parties' agreement to exclude the mitigation of the Player's damages qualifies as a penalty clause sanctioning the Club's breach of contract. BAT arbitrators have frequently found that penalty clauses are principally acceptable, subject to the limitations described above. Here, the Arbitrator finds that the penalty triggered by the Club's breach is not abusive. The Player Contract was valid for only one season, which means that – foreseeably – the maximum possible penalty was limited to the Player's annual salary. In light of the fact that a contract termination for just cause in the middle of the season naturally exposes the Player to a substantial risk of not being able to secure any other income for the remainder of the season, it is appropriate to shift this type of risk on the breaching party entirely, without regard to the Player's subsequent success in finding a new employment after the contract termination. The fact that the application of the exclusion clause effectively amounts to a windfall benefitting the Player does not change this result. The "windfall aspect" is inherent in any penalty clause, and it is an acceptable consequence of penalizing the club for its breach of the main contractual duty.

⁵ *Berger/Kellerhals*, International and Domestic Arbitration in Switzerland (2nd ed.), Para 1321, with further references.

⁶ *Berger/Kellerhals*, International and Domestic Arbitration in Switzerland (2nd ed.), Para 1319.

50. For the sake of clarification, the Arbitrator would like to point out that the type of penalty clause at issue here may not always and not automatically pass the validity test established by CAS and BAT (as discussed above). Whether the exclusion clause may be given effect is to be determined on a case by case basis, and there may well be scenarios in which the application of the penalty clause results in an unacceptably high penalty requiring judicial adjustment. However, the present case does not fall within this category, which means that the exclusion clause will be given full effect by the Arbitrator.
51. As a result the Arbitrator awards Claimants the following amounts (in line with Claimants' prayers for relief): USD 195,550.00 (215,000.00 total minus USD 19,450.00 already received) as salary to the Player, and USD 21,500.00 as agency fee to the agency. All payments awarded in this arbitration are net payments.

8. 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 21 February 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 6,220.00.

54. Considering that Claimants fully prevailed with all of their requests in the present arbitration, it is consistent with the provisions of the BAT Rules that 100% of the fees and costs of the arbitration, as well as 100% of Claimants' reasonable costs and 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 6,220.00 to Claimants, being the amount of the arbitration costs determined by the President;
 - The BAT shall reimburse Claimants the amount of EUR 4,780.00, being the difference between the amount advanced by them (EUR 11,000) and the reimbursement to be received from Respondent (EUR 11,000 – EUR 6,220.00);
 - Respondent shall pay EUR 450 to Claimants as a reimbursement towards their attorneys' fees. The Arbitrator finds that such amount is reasonable under the circumstances. Respondent shall further pay a reimbursement to the Claimants in the amount of EUR 3,000.00, constituting the handling fee.

9. AWARD

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

- 1. Trabzonspor Basketball Kulubu Dernegi is ordered to pay Mr. Tomislav Zubcic USD 195,550.00 net as compensation for unpaid salaries.**
- 2. Trabzonspor Basketball Kulubu Dernegi is ordered to pay Bill A. Duffy International Inc. USD 21,500.00 net as unpaid agency fees.**
- 3. Trabzonspor Basketball Kulubu Dernegi is ordered to pay jointly to Mr. Tomislav Zubcic and Bill A. Duffy International Inc. EUR 6,220.00 as a reimbursement of the arbitration costs.**
- 4. Trabzonspor Basketball Kulubu Dernegi is ordered to pay jointly to Mr. Tomislav Zubcic and Bill A. Duffy International Inc. EUR 3,450.00 as a contribution towards their legal fees and expenses.**
- 5. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 27 February 2018

Annett Rombach
(Arbitrator)