



**BASKETBALL**  
ARBITRAL TRIBUNAL

## **ARBITRAL AWARD**

**(BAT 1703/21)**

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Klaus Reichert**

in the arbitration proceedings between

**Mr. Nemanja Gordic**

represented by Ms. Nevena Simovic, attorney at law

vs.

**Basketball Club Partizan**

Humska 1  
11000 Belgrade, Serbia

represented by Mr. Ilija Dražić and Ms. Aleksandra Stojic, attorneys at law

**- Claimant -**

**- Respondent -**

## **1. The Parties**

### **1.1 The Claimant**

1. Mr. Nemanja Gordic is a BiH professional basketball player (“Player”).

### **1.2 The Respondent**

2. Basketball Club Partizan is a Serbian professional basketball club (“Club”).

## **2. The Arbitrator**

3. On 27 July 2021, Mr. Raj Parker, the Vice-President of the Basketball Arbitral Tribunal (the “BAT”), appointed Mr. Klaus Reichert as arbitrator (“Arbitrator”) pursuant to Articles 0.4 and 8.1 of the Rules of the Basketball Arbitral Tribunal in force as from 1 December 2019 (“BAT Rules”). The Parties have not raised any objection to the appointment of the Arbitrator, to his declaration of independence and impartiality, or to his conduct of this arbitration.

## **3. Facts and Proceedings**

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

4. The background to this arbitration arises from two contractual documents: (a) one between Player and Club dated 17 July 2020 (as a supplement to a “Standard Contract”) whereby the salary of the former payable by the latter as a professional basketball player for the 2020-2021 season was agreed at EUR 300,000.00 (“Player Contract”) payable in 10 equal monthly instalments from 15 September 2020 to 15 June 2021; and (b) a later

one between Player and Club dated 30 December 2020 whereby the Parties agreed to go their separate ways on certain specified terms (“Termination Contract”).

5. The Termination Contract specified a number of outstanding amounts which were due to Player from Club as of its date (such as arrears of wages and expenses) and that these were to be paid upon signature. The Arbitrator does not understand that any issue of note arises from these specified amounts. Of present relevance are two amounts of EUR 30,000.00 each, which Club agreed to pay Player on 25 January 2021 and 25 March 2021 respectively. These amounts were expressly described as “*fees for the early termination of the contract*”.
6. Club did not make the two specified payments of EUR 30,000.00, but paid EUR 17,000.00 in February 2021. No further payments were made leaving Player EUR 43,000.00 short. Club does not dispute that it must pay Player that amount and says that economic conditions were against timely payment in accordance with the Termination Contract.
7. The dispute which actually divides the Parties is another aspect of the Termination Contract, namely, part of Art. 3:

*“In the event that the Club fails to settle all the obligations undertaken by this Article until 25.05.2021, the Player has the right to claim the full value of the contract, signed on 17.07.2020.”*

8. Player says that as Club did not complete the settlement obligations specified in the Termination Contract, he wishes to claim the full value of the Player Contract being EUR 120,000.00. This figure comprises four monthly salary instalments of EUR 30,000.00 each (being March-June 2021) which would be left over as part of the full value of the Player Contract when one takes into account the two amounts of EUR 30,000.00 each prescribed by the Termination Contract.

9. Club's position is that Player is not entitled to EUR 120,000.00 as it considers that he ultimately was better off financially from having gone to another club (BC Mornar in Montenegro). It also seeks to rely on its negotiations with Player to extend the payment terms on foot of the Termination Contract (which did not bear fruit).

### **3.2 The Proceedings before the BAT**

10. On 25 June 2021, the BAT received a Request for Arbitration (of the same date) filed by Player in accordance with the BAT Rules and the non-reimbursable handling fee of EUR 3,000.00 was duly paid (received by the BAT on 29 June 2021).
11. On 29 July 2021, the BAT informed the Parties that Mr. Klaus Reichert had been appointed as the Arbitrator in this matter, invited Club to file an Answer to the Request for Arbitration in accordance with Article 11.4 of the BAT Rules (by no later than 19 August 2021) and fixed the Advance on Costs to be paid by the Parties as follows:

*"Claimant (Nemanja Gordic) EUR 4,000.00*

*Respondent (BC Partizan) EUR 4,000.00"*

12. The Advance on Costs was received by BAT as follows: 3 August 2021, EUR 4,000.00 paid by Player; and 25 August 2021, EUR 4,000.00 paid by Player.
13. Club's Answer to the Request for Arbitration was filed on 18 August 2021.
14. Player filed his Reply on 7 September 2021.
15. Club filed its Rejoinder on 22 September 2021.
16. On 24 September 2021, the BAT communicated the following message of the Arbitrator to the Parties:

*“The Arbitrator notes that the exchange of submissions has now been completed. Prior to formally closing the proceedings and inviting submissions on costs, and bearing in mind Article 12.3 of the BAT Rules, the Parties are invited to consider their respective positions in order to see whether a settlement of the whole case is possible. Under no circumstances should the Arbitrator, or the BAT, be included in any correspondence in that regard or be made aware of the contents (even inferentially) of any such discussions at any time.*

*The Parties are given until Friday 1 October 2021 to consider their respective positions and liaise (insofar as they each might see fit). On 5pm (Munich time) on 1 October 2021, the Parties are to inform the BAT whether the case is settled, or not. That is the sole matter which should be communicated at that time and no other submission whatsoever. Any comment, whether inferential or express, is strictly prohibited and the Sole Arbitrator will police that stricture with very close precision.”*

17. The Parties did not settle the arbitration and the BAT was so informed on 1 October 2021.
18. By Procedural Order dated 6 October 2021, the Parties were invited to set out (by no later than 13 October 2021) 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 submissions was completed in accordance with Article 12.1 of the BAT Rules.
19. Player filed his costs submission on 6 October 2021. Club did not file costs submissions.

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

##### **4.1 Player’s Position**

20. In the Request for Arbitration Player’s prayer for relief was stated as follows:

*“Claimant(s) request(s):*

*a) To award claimant Nemanja Gordie with amount of 43.000 EUR (forty three thousand) and additionally to award claimant's interest at the applicable Swiss statutory rate, starting from 26th of March 2021, which equals to 358 EUR (three hundred fifty eight), at the time the present Request for BAT Arbitration was filed.*

*b) To award claimant Nemanja Gordie 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 26th of May 2021, which equals to 500 EUR (five hundred), at the time the present Request for BAT Arbitration was filed.*

*c) To award claimants with the full covered costs of this Arbitration and Legal fees and expenses.*

*Having in mind that in case of dispute the agreements set the authority of Basketball Arbitration Tribunal (BAT), therefore, the claimant demand arbitrage of BAT.*

*A+B= 43.000+358+120.000+500= 163.858 EUR”*

21. The Arbitrator has already noted in the section above on the summary of the dispute a broad outline of Player's positions. To the extent strictly relevant and necessary for the disposition of this case, the Arbitrator will discuss and analyse those positions in detail below.

#### **4.2 Club's Position**

22. Club's Answer requests as follows:

*“...the Respondent respectfully requests the Arbitrator to: (1) accept Claim of the Claimant in the amount EUR 43,000, plus interests as of 10 June 2021 at the rate of 5% p.a.; and (2) dismiss entirely remaining part of the Claimant's claim (i.e., EUR 120,000).”*

23. As already noted above, and as made clear by Club's request for relief, no issue is taken with its obligation to pay EUR 43,000.00 to Player (save for a difference on when interest starts to run). The real issue which divides the Parties is Club's position that it does not have to pay Player anything else as it considers having to do so would be unfair as he played elsewhere for the balance of the 2020-2021 season. Put more clearly and succinctly, the Arbitrator considers Club's defence to be one of mitigation in line with

long-established BAT awards.

## 5. The jurisdiction of the BAT

24. First, the BAT Vice-President has determined pursuant to Article 11.1 of the BAT Rules, *prima facie*, that the subject matter of this arbitration is arbitrable and the arbitration could thus proceed. Secondly, according to Article 1.3 of the BAT Rules, it now falls to the Arbitrator to finally decide jurisdiction.
25. 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).
26. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the Parties.
27. 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.<sup>1</sup>
28. As regards Player’s claim, the jurisdiction of the BAT over the dispute is said to result from Art. 3 of the Player Contract and Art. 4 of the Termination Contract (both in translation from the original Serbian in identical terms):

*“All disputes arising out of in connection with this Contract shall be submitted to the FIBA Basketball Court of Arbitration (BAT) in Geneva, Switzerland and shall be finally resolved on the basis of the BAT Arbitration Rules. Judge-arbiter shall decide the dispute ex aequa et bona (according to the right and good).”*

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

29. Both the Player Contract and the Termination Contract are in written form and thus the arbitration agreements fulfil the formal requirements of Article 178(1) PILA. In particular, the written form requirement of Article 178(1) PILA does not require the arbitration agreement to be signed, as long as it is concluded in a way that “*allow[s] proof of the agreement by text*”.<sup>2</sup> This is undisputedly the case here.
30. Moreover, the predicate wording “[a]ll disputes arising out of in connection with this Contract [...]” clearly covers the present dispute.
31. Club did not dispute the existence of the arbitration agreements, participated fully in the case without reservation, and expressly confirmed the Arbitrator’s BAT jurisdiction in the Answer.
32. Thus, 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).
33. For the above reasons, the Arbitrator finally holds, pursuant to Article 1.3 of the BAT Rules, that he has jurisdiction to decide and rule upon Player’s claims against Club.

## **6. Discussion**

### **6.1 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

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<sup>2</sup> English translation of Article 178(1) PILA. See also Decision of the Federal Tribunal 4P.124/2001 of 7 August 2001, para. 2c.



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”.*

35. Under the heading "Law Applicable to the Merits", Article 15 of the BAT Rules reads as follows:

*“15.1 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.*

*15.2 If, according to an express and specific agreement of the parties, the Arbitrator is not authorised to decide ex aequo et bono, he/she shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to such rules of law he/she deems appropriate. In both cases, the parties shall establish the contents of such rules of law. If the contents of the applicable rules of law have not been established, Swiss law shall apply instead.”*

36. Art. 3 of the Player Contract and Art. 4 of the Termination Contract both expressly authorise the Arbitrator to rule *ex aequo et bono*. Consequently, the Arbitrator shall proceed accordingly.
37. 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>3</sup> (Concordat)<sup>4</sup>, under which Swiss courts have held that arbitration “en équité” is fundamentally different from arbitration “en droit”:

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<sup>3</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>4</sup> P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

*“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>5</sup>*

38. 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*”.

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

## **6.2 Findings**

40. By way of introduction, the Arbitrator recalls the consistent position taken now over many years by BAT arbitrators that 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 corner-stone principle by which the merits of Player’s claims are now examined.

41. By way of further introductory comment, as is consistently the position in BAT awards (applying the interpretative principles contained in, for example, BAT 0756/15), the Arbitrator is not invariably held to the precise wording used by parties. It is, of course, entirely open to parties to make such a stipulation if they so wish in their contractual arrangements, but that is not the case here.

42. As already noted above, there is no dispute between the Parties as regards Club’s obligation to pay Player EUR 43,000.00 arising from the Termination Agreement. The Arbitrator will analyse the remaining concomitant aspect of that claim, namely, interest later on in this Award.

43. Turning to Player’s claim for EUR 120,000.00, the Arbitrator notes at the outset of his

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<sup>5</sup> JdT 1981 III, p. 93 (free translation).

analysis that the Parties spent much of their submissions on matters such as Player's performance, his relationship with the coach, and the motivation for the Termination Contract. None of these matters have any demonstrable relevance to the obligations articulated in the Termination Contract. That document speaks for itself and neither side has advanced any legal reason why its interpretation should be influenced by whatever might, or might not have happened in a sporting or personal context between Player and Club's personnel. By way of example, Club's submission in the Answer that "*Player and the Club concluded the agreement to terminate the cooperation based on the consent of their wills, and not because one or the other Party wants to unilaterally terminate the Agreement*" adds nothing of legal significance to the disposition of the Parties' prayers for relief.

44. The Termination Contract is quite clear as to how it would operate in the event of Club's default, namely, unless all sums were paid on or before 25 May 2021, Player could seek the full value of the Player Contract. There is no doubt but that Club did not pay Player in full by 25 May 2021, and therefore, *pacta sunt servanda* mandates the triggering of that part of Art. 3 of the Termination Contract quoted above. Once that date passed without Club making full payment on foot of the Termination Contract, the die was cast legally and contractually speaking. Once Art. 3 of the Termination Contract was triggered, any prior or anterior attempt by Club to negotiate or elongate payment to Player of such full amounts according to its terms, necessarily were rendered moot. In passing and in any event, at most, the Arbitrator is of the view that Club has no basis, of any kind, to complain that its offers to make staged payments over several months did not elicit a positive response from Player. In reality this argument seeks to rely on an attempt to renegotiate existing payment terms in order to avoid the consequence of a failure to adhere to actual obligations.
45. Once the default mechanism of the Termination Contract was triggered, which it was, the next issue is an examination of the financial consequences.

46. The Arbitrator accepts, initially, that once the two admitted fees of EUR 30,000.00 each (as per the Termination Agreement) are taken into account, then the remaining full value of the Player Contract was EUR 120,000.00. This is because the two EUR 30,000.00 fee payments appear to correspond to the January and February 2021 salary amounts which would have been paid had the Player Contract continued in force. That leaves the March-June 2021 salary instalments (4 x EUR 30,000.00).
47. However, the dispute does not end there as Player did find alternative employment in Montenegro for a total salary of EUR 100,000.00 payable in 5 monthly instalment of EUR 20,000.00 from 15 January 2021 to 15 May 2021. Club's Rejoinder attempts to cast doubt on the veracity of this amount insinuating that Player received more than EUR 100,000.00 However, Club has not provided a single shred of evidence for this bold assertion. Therefore, the Arbitrator is not persuaded that Player has been anything other than truthful in the presentation of his contract with BC Mornar, particularly as the Reply was signed by his Counsel. Any attempt by either a party to a BAT proceeding, or their counsel, to present a document which is untruthful or materially misleading or doctored would be a matter of the gravest seriousness which might ultimately lead to adverse consequences of a profound nature at a later date. The Arbitrator has no reason to question to bona fides of the BC Mornar contractual document placed by Player and his Counsel onto the record of this arbitration.
48. Taking an overall view of Player's contractual expectations for the 2020-2021 season had the Player Contract run through to its normal conclusion, he would have received EUR 300,000.00. Based on long-standing BAT principles of mitigation, Player should not ultimately get more than that amount for that season.
49. Upon the assumption that Player received EUR 100,000.00 from BC Mornar for part of that 2020-2021 season, that obviously leaves a remaining amount of EUR 200,000.00 from the overall salary which he would have earned had all gone to plan with Club.

50. From that remaining amount of EUR 200,000.00, one must next take into account the admitted amount of EUR 43,000.00 arising out of the Termination Contract, which leaves EUR 157,000.00.
51. Of the aforementioned EUR 157,000.00, the Arbitrator must deduct the salary payments actually made by Club during the life of the Player Contract. Insofar as the Arbitrator is able to discern the position, Player's monthly salaries up to and including the December 2020 instalment were paid by Club, namely, four (September-December, 4 x EUR 30,000.00 = EUR 120,000.00). Subtracting EUR 120,000.00 from EUR 157,000.00 is EUR 37,000.00.
52. What all of this means is that Player's final position as of the end of the 2020-2021 season was that he was left short EUR 43,000.00 (the fees agreed pursuant to the Termination Contract) and EUR 37,000.00 salary (being the remaining full value of the Player Contract less the appropriate mitigation deduction for the amount Player earned in Montenegro). These are the two amounts which Club must pay Player.
53. For the avoidance of doubt, the Arbitrator is not persuaded that Player should be awarded the full EUR 120,000.00 sought by him as this would not give credit for the principle of mitigation. The Arbitrator is at a loss to understand why Player has never given credit in his claim for the full value of the Player Contract for amounts earned in Montenegro.
54. Turning to interest, the Arbitrator upholds Player's claim for interest at 5% per annum, being the rate consistently applied in prior BAT awards, on any outstanding balance (as may be the case from time to time) thereof until payment in full as follows:
- On the amount of EUR 43,000.00 running from 26 March 2021 – the commencement date is consistent with the date on which the second instalment of termination fees was due; and

- On the amount of EUR 37,000.00 running from 26 May 2021 – the commencement date is consistent with the date by which the default mechanism of the Termination Contract is engaged.

## 7. Costs

55. In respect of determining the arbitration costs, Article 17.2 of the BAT Rules provides as follows:

*“At the end of the proceedings, the BAT President shall determine the final amount of the arbitration costs, which shall include the administrative and other costs of the BAT, the contribution to the BAT Fund (see Article 18), the fees and costs of the BAT President and the Arbitrator, and any abeyance fee paid by the parties (see Article 12.4). [...]”*

56. On 6 January 2022, the BAT Vice-President determined the arbitration costs in the present matter to be EUR 6,350.00.

57. As regards the allocation of these arbitration costs as between the Parties, Article 17.3 of the BAT Rules provides as follows:

*“The award shall determine which party shall bear the arbitration costs and in which proportion. [...] When deciding on the arbitration costs [...], 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.”*

58. As Player prevailed, mostly, in his claim, Club bears responsibility to a factor of 50% for his arbitration costs, namely, EUR 3,175.00 This percentage reflects *inter alia* the fact that Player did not give any credit, right to the end, for the amounts he received while playing in Montenegro notwithstanding the longstanding principles of mitigation which were, plainly, applicable to this matter. The other matters relevant for this percentage are discussed, further, below.

59. In relation to the Parties' legal fees and expenses, Article 17.3 of the BAT Rules provides that:

*“as a general rule, the award shall grant the prevailing party a contribution towards any reasonable legal fees and other expenses incurred in connection with the proceedings (including any reasonable costs of witnesses and interpreters). When deciding [...] on the amount of any contribution to 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.”*

60. Moreover, Article 17.4 of the BAT Rules provides for maximum amounts that a party can receive as a contribution towards its reasonable legal fees and other expenses.
61. Player claims legal fees in the amount of EUR 8,000.00 (not including the non-reimbursable handling fee). This amount falls below the maximum awardable amount (not including the non-reimbursable handling fee) as prescribed by Article 17.4 of the BAT Rules.
62. The Arbitrator considers that EUR 4,000.00 is an appropriate amount of legal fees to be awarded to Player as against Club in this matter, which is an amount consistent with the prior finding on arbitration costs (50%). In coming to this conclusion the Arbitrator bears a number of matters in mind. First, Club consistently admitted its obligation to pay Player EUR 43,000.00. Secondly, Player did not give any credit, right to the end, for mitigation amounts earned in Montenegro. Thirdly, Club made a number of speculative accusations about the probity of the Montenegrin contract Player presented with his Reply. Taken together, a deduction of 50% is appropriate.
63. Taking into account the factors required by Article 17.3 of the BAT Rules, the maximum awardable amount prescribed under Article 17.4 of the BAT Rules, and the specific circumstances of this case (which includes all the matters discussed above), the Arbitrator holds that EUR 4,000.00 for Player's legal fees and EUR 3,000.00 expenses (for the non-reimbursable handling fee) represent a fair and equitable contribution by Club in this regard.

64. In summary, therefore, the Arbitrator decides that in application of Articles 17.3 and 17.4 of the BAT Rules:

- (i) Club shall pay to Player EUR 3,175.00 in respect of the costs of arbitration;
- (ii) The BAT will reimburse the balance of the advance on costs in the amount of EUR 1,650.00 to Player.
- (iii) Club shall pay to Player EUR 7,000.00 representing a contribution to the amount of the latter's legal fees and other expenses; and
- (iv) Club shall bear its own legal fees and expenses.



## **8. AWARD**

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

- 1. Basketball Club Partizan is ordered to pay Mr. Nemanja Gordic EUR 43,000.00, by way of termination fees and EUR 37,000.00 by way of unpaid salary, together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) thereof until payment in full on:**
  - the amount of EUR 43,000.00 running from 26 March 2021; and
  - the amount of EUR 37,000.00 running from 26 May 2021.
- 2. Basketball Club Partizan is ordered to pay Mr. Nemanja Gordic EUR 3,175.00 in respect of the costs of arbitration.**
- 3. Basketball Club Partizan is ordered to pay Mr. Nemanja Gordic EUR 7,000.00 in respect of the latter's legal fees and expenses.**
- 4. Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 12 January 2022

Klaus Reichert  
(Arbitrator)