BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0116/10)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert

in the arbitration proceedings between

Ms. Sandra Mandir
c/o Mr. Salim Baki, Osmaniye May Mine Sok., Emre Konutlari,
A Blok D:26, 34144 Bakirkoy-Istanbul, Turkey

- Claimant -

vs.

Beşiktaş Jimnastik Kulübü Dernegi
Suleyman Seba Caddesi, No. 48 BJK Plaza, Akaretler, Beşiktaş, 34357 Istanbul, Turkey

- Respondent -

1. The Parties

1.1 The Claimant

1. Ms. Sandra Mandir ("Claimant") is a professional basketball player. She was engaged by Beşiktaş Jimnastik Kulübü Dernegi ("Respondent") to play the season 2009/2010. That engagement was reflected in a written agreement dated 14 July 2009 ("the Agreement").

1.2 The Respondent

2. Respondent is a professional basketball club with its address at Suleyman Seba Caddesi, No. 48 BJK Plaza, Akaretler, Beşiktaş, 34357 Istanbul, Turkey.

2. The Arbitrator

3. On 24 August 2010, the President of the Basketball Arbitral Tribunal (the "BAT") appointed Mr. Klaus Reichert as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules"). Neither of the Parties has raised objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1 Background Facts

4. The Agreement sets out the terms and conditions upon which Claimant was retained

by Respondent to play in the 2009-2010 basketball season. She was to be paid EUR 88,000.00 in seven monthly instalments on, in almost all cases, the last day of each month following the passing of a medical examination. The payment dates were 30 September, 31 October, 30 November, 30 December, 31 January, 28 February and 31 March. Amongst other items Respondent was to pay for two round-trip plane tickets between Turkey and Croatia. Respondent was also to provide a car and a furnished apartment (with utilities discharged by Respondent). The Agreement provided for a no-cut guarantee.

3.2 The proceedings before the BAT

5. Claimant filed a Request for Arbitration (received by BAT on 19 August 2010) in accordance with the BAT Rules, and on 18 August 2010 the non-reimbursable fee of EUR 2,000.00 was duly paid. The Request for Arbitration sought payment of:

   - EUR 45,748.50 for the non-paid salary and interest at the applicable Swiss statutory rate from the due date of each payment
   - Compensation of arbitration fees and costs
   - A contribution towards her legal fees and expenses

6. On 26 August 2010 the BAT informed the Parties that Mr. Klaus Reichert had been appointed as the Arbitrator in this matter, and fixed the amount of the advance on costs to be paid by the Parties at EUR 3,500.00 each. Claimant paid her share on 9 September 2010.

7. In addition on 26 August 2010, the BAT sent the Request for Arbitration, together with the Exhibits thereto, to Respondent. In the covering letter the BAT notified Respondent that the Answer was due, in accordance with Article 11.2 of the BAT Rules, by 17 September 2010.

8. Respondent delivered its Answer on 17 September 2010.

9. Given that Respondent failed to pay its share of the Advance on Costs, on 21 September Claimant was invited by the BAT to effect the substitute payment. Claimant made this payment on 30 September 2010.

10. On 15 October 2010 the BAT informed the parties that the Arbitrator decided to give Claimant the opportunity to comment on the Answer and to do so no later than 29 October 2010.

11. On 28 October 2010 Claimant made observations by email.

12. On 29 October 2010 Respondent was afforded the opportunity to comment on Claimant's observations and to do so no later than 12 November 2010.

13. On 12 November 2010 Respondent made its comments by email.

14. On 25 November 2010 the Arbitrator asked the parties whether they wished to file any further documentary evidence or were they content that all such evidence was before him. A deadline was given of 3 December 2010.

15. Claimant made final comments on 3 December 2010. Respondent made no comments.

16. On 8 December 2010 the Arbitrator issued a procedural order, pursuant to Article 12.1 of the BAT Rules providing that the exchange of documents was completed and inviting the Parties to submit their claims for costs by 15 December 2010.

17. On 10 December 2010 Claimant submitted her account of costs.

18. On 15 December 2010 Respondent submitted its account of costs.

19. On 15 December 2010 the parties were afforded an opportunity to comment on the other's claim for costs and to do so by 20 December 2010.

20. On 20 December 2010 Respondent made comments in opposition to Claimant's claim

for costs.

21. On 24 December 2010 Claimant made comments by way of reply to Respondent on the claim for costs.

22. By letter dated 6 April 2011, the BAT Secretariat informed the Parties that the FIBA Arbitral Tribunal (FAT) had been renamed into Basketball Arbitral Tribunal (BAT) and that, unless one of the Parties opposed by 11 April 2011, the new name would be applied also to the present proceedings. Neither of the Parties raised any objections within the said time limit.

4. The Parties' Submissions

4.1 The Claimant's submissions

23. Claimant's prayer for relief is set out at paragraph 5 above. The arguments put forward by Claimant are analysed below under the heading "Discussion and conclusion on the essential facts".

4.2 The Respondent's submissions

24. Respondent denies Claimant's claims and the arguments put forward by it are analysed below under the heading "Discussion and conclusion on the essential facts".

5. 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

5.1 Review – the arbitration agreement

27. The Arbitrator notes that the Agreement provides for the following under clause "ARTICLE VII – FINAL CLAUSES":

> *"Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitrate [sic] Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the 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. Awards of the BAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. The parties expressly waive recourse to the Swiss Federal Tribunal against awards of the CAS upon appeal, as provided in Article 192 of the Swiss Act on Private International Law. The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono."*

5.2 Arbitrability

28. 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) PILA1.

5.3 Formal and substantive validity of the arbitration agreement

29. The existence of a valid arbitration agreement is to be examined in light of Article 178

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

PILA, which reads as follows:

> *"1 The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.*
>
> *2 Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law."*

30. The jurisdiction of the BAT over the present dispute results from the arbitration clause already described above in paragraph 27.

31. The Agreement submitted with the Request for Arbitration is in written form and thus the arbitration agreement fulfils 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 that could cast doubt on the validity of the arbitration agreement as between Claimant and Respondent under Swiss law (referred to by Article 178(2) PILA). Further, at no stage was the validity of the arbitration agreement or the jurisdiction of BAT called into question by Respondent.

6. Discussion

6.1 Applicable Law – ex aequo et bono

33. With respect to the law governing the merits of the dispute as between Claimant and Respondent, Article 187(1) PILA provides that the arbitral tribunal must decide the case according to the rules of law chosen by the parties or, in the absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PILA adds that the parties may authorize the arbitrators to decide "*en équité*" instead of choosing the application of rules of law. Article 187(2) PILA is generally translated into English as follows:

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

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. As already noted in paragraph 27 above, the Agreement provides that, in case of dispute, the BAT Arbitrator "shall decide the dispute *ex aequo et bono*".

36. The concept of "*équité"* (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the Concordat intercantonal sur l'arbitrage[2] (Concordat)[3], under which Swiss courts have held that arbitration "*en équité"* is fundamentally different from arbitration "*en droit"*:

> *"When deciding ex aequo et bono, the Arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules."*[4]

37. In substance, it is generally considered that an arbitrator deciding *ex aequo et bono* receives "a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case".[5]

38. This is confirmed by Article 15.1 of the BAT Rules 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.

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2 That is, the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration) and, most recently, the Swiss Code of Civil Procedure (governing domestic arbitration).

3 P.A. KARRER, Basler Kommentar, No. 289 ad Art. 187 PILA.

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

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

6.2 Findings

6.2.1 Discussion and conclusion on the essential facts

40. The Request for Arbitration records the actual payments made by Respondent to Claimant from September 2009 onwards. While the first milestone payment of EUR 11,000.00 was made early, the three subsequent payments were made late (and as time went on, the gap between the due date and the actual payment date became ever longer). Also, the payments due in October and November 2009 were not made in the full amount. The December payment was only made on 12 March 2010. The Answer does not put the foregoing in issue.

41. Claimant says that she gave notice to Respondent on 13 March 2010 (the exhibited letter is dated 13 February 2010 but the text of the letter suggests that this was a typographical error) that it should pay all debts within seven days otherwise she would terminate. Respondent's Answer does not dispute receipt of, or even refer to, this letter.

42. Claimant says that she notified Respondent on 22 March 2010 that the Agreement was terminated. She further says that on the same day the Foreign Relations Director of Respondent notified Claimant's Agent that the car provided should be immediately returned and that she should vacate the apartment. A signed (stated to be on behalf of Respondent) receipt confirming the return of the car is attached to the Request for Arbitration. Respondent's Answer does not dispute any of the foregoing.

43. In summary, it is established as a matter of fact, taking careful account of the submissions of the parties, that:

    (1) Respondent failed to pay Claimant the due milestone payment of EUR 11,000.00 on 31 October 2009 but paid her EUR 10,127.88 on 11 November 2009 – leaving her EUR 872.12 short;

    (2) Respondent failed to pay Claimant the due milestone payment of EUR 11,000.00

on 30 November 2009 but paid her EUR 10,123.62 on 19 January 2010 – leaving her EUR 876.38 short;

(3) Respondent failed to pay Claimant the due milestone payment of EUR 11,000.00 on 30 December 2009 but paid that amount on 12 March 2010;

(4) As of the payment on 12 March 2010 Respondent was two payments behind (January and February) plus the amounts by which the October and November payments were left short;

(5) Claimant warned Respondent on 13 March 2010 of her intention to terminate within seven days unless her due salaries were paid and Respondent was aware of this threat;

(6) Claimant terminated the Agreement on 22 March 2010 and Respondent was aware of this fact; and

(7) Claimant returned the car which Respondent had provided pursuant to the Agreement and Respondent was aware of this.

44. Respondent says that it was an agreed practice which took shape between the parties that payments would be late. Claimant disputes this. There is no evidence before the Arbitrator which sustains the argument that Claimant signified that she was content with late payments. This contention of Respondent is dismissed as a matter of fact. It requires no further exposition.

45. Respondent says that the Claimant left Turkey without prior notice or permission on 22 March 2010. This is not sustainable as a matter of fact in light of the factual findings noted at paragraph 43 (points 5-7 inclusive) above.

46. Respondent says that it paid Claimant EUR 19,000.00 in August 2009. Claimant denies this and specifically sought proof from Respondent. Respondent's Reply did not rise to this challenge and was silent. Respondent has failed to prove, as a matter of fact, that it paid EUR 19,000.00 to Claimant in August 2009.

47. Respondent says that it fined Claimant by reason of her leaving Turkey without permission. In the light of the factual findings as set out above it appears to the Arbitrator that the factual basis for such fines was untenable.

6.2.2 Discussion of ex aequo et bono and the relevant principles for this Arbitration including their application

48. The Arbitrator has identified the principal consideration which reflects justice and fairness for the purposes of this Arbitration.

49. It is a matter of universal acceptance that *pacta sunt servanda*, i.e., that parties who entered into contracts are bound by their terms. Observance of obligations entered into is a fundamental and integral matter common throughout all civilized nations and legal systems. Without such a principle, commerce, honesty, and the integrity of dealings would all but vanish. It is just and fair that when parties enter into the sort of contracts which they did in this matter, then the provisions of such contracts should be observed.

50. Respondent is obliged to adhere to the contractual obligations it entered into with Claimant. Respondent signed the Agreement with Claimant. Claimant clearly has the legitimate entitlement to be paid the sums of money agreed between the Parties.

51. Respondent agreed to a no-cut provision. It must bear the consequences of that decision. It also made it clear in the Agreement that the sums which it was bargaining to pay Claimant were guaranteed and net after taxes. It must bear the consequences of that decision.

52. Based upon the factual findings made above and the foregoing analysis of the principles *ex aequo et bono* which the Arbitrator finds are applicable, it is clear that Claimant's claims are well-founded.

53. It, therefore, remains for analysis whether Respondent's position, in effect a set-off by reason of a fining of Claimant holds good. Consistent with the principles already described above, the parties will be held to their bargain as described in the

Agreement. Article IV(2) of the Agreement gives the right to Claimant to request termination thereof if 45 work days pass from a scheduled date for the payment of a salary instalment. If Respondent does not cure the position within seven days then Claimant has the right to unilaterally terminate the Agreement. As found by the Arbitrator as a matter of fact in paragraph 43 (point 4) above, both the January and February milestone payments were unpaid as of 12 March 2010.

54. As mentioned above, Claimant issued such a request pursuant to the Agreement and no cure was forthcoming from Respondent within the prescribed seven days. She thereupon unilaterally terminated the Agreement. The Respondent, as a matter of fact, was both aware of that termination and also collaborated in its consequences, namely it took back the car which it had provided to Claimant pursuant to the Agreement.

55. As a matter of the terms of the Agreement it appears to be quite clear that it had come to an end by reason of Claimant's notice. This was a result of Respondent's breach and failure to pay salary in accordance with the terms of the Agreement. As a matter of justice and equity it appears to the Arbitrator that Claimant was entirely justified in taking the steps she did.

56. Thus, the consequence of the foregoing is that any action of Respondent subsequent to such termination, as in an attempt to fine Claimant, cannot have any foundation. The Agreement was at an end by the time Respondent purportedly fined Claimant.

57. Further, if the Arbitrator were to uphold Respondent's action and deduct monies from Claimant's claim it would, in reality, reward Respondent for its own wrongdoing. Claimant left Respondent because she was not being paid in accordance with the Agreement. She followed the prescribed formula in the Agreement to bring it to an end and she is not in the wrong.

58. By way of completeness, Respondent makes the argument that it paid certain sums to third parties (e.g. rent) and that entitled it to deduct these from payments made to Claimant. This is dealt with shortly. The Agreement does not give Respondent any such entitlement to deduct such monies.

59. Finally, the computation of Claimant's claim is correct. Unquestionably she is entitled to four outstanding milestone payments of EUR 11,000.00 each. That comes to EUR 44,000.00. She is also entitled to the balance of the two payments (October and November) which were short. Those two amounts are EUR 872.12 and EUR 876.38. Those two amounts add up to EUR 1,748.50. Putting that amount with EUR 44,000.00 brings one to the correctly claimed sum of EUR 45,748.50.

60. Turning to interest, it is well founded as a principle of universal application that a party who is deprived of a due sum of money is entitled to some recompense (in addition to an order for payment of the principal). This is widely referred to as interest. The Arbitrator believes that as a matter of universal application interest runs from the day after the date on which the principal amounts are due. Indeed, it appears just and fair that when one party is deprived of a sum of money after the date upon which it is due, interest accrues to alleviate the situation.

61. What remains to be identified is the rate of interest. Claimant seeks 5%. In line with the jurisprudence of the BAT, the Arbitrator holds that an interest rate equal to the applicable Swiss statutory rate which is 5% per annum, is reasonable and equitable in the present case. Also what needs to be identified is from when interest will run. It appears to the Arbitrator that the appropriate time is one day after each instalment (including those that were paid, but late) was originally due. Thus, Respondent must pay interest at 5% per annum as follows:

- on EUR 11,000.00 from 1 November 2009 to 11 November 2009;
- on EUR 862.12 from 11 November 2009;
- on EUR 11,000.00 from 1 December 2009 to 19 January 2010;
- on EUR 876.38 from 19 January 2010;
- on EUR 11,000.00 from 31 December 2009 to 12 March 2010;
- on EUR 11,000.00 from 1 February 2010;

- on EUR 11,000.00 from 1 March 2010;
- on EUR 11,000.00 from 1 April 2010; and
- on EUR 11,000.00 from 1 May 2010.

7. Costs

62. 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 may either be included in the award or communicated to the parties separately. Furthermore, Article 17.3 of the BAT Rules provides that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, it shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

63. On 20 April 2011, 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 5,550.00

64. Considering that Claimant prevailed in her claims, it is appropriate that Respondent should bear the arbitration costs and be required to cover its own legal fees and expenses as well as those of Claimant. Respondent disputes the sum claimed for legal costs by Claimant and invokes Turkish law provisions. These do not appear to the Arbitrator to be determinative of the matter. The Arbitrator has carefully assessed the amount of work done on Claimant's behalf, the number of allegations which were made and had to be addressed, the number of communications and written pleadings which had to be made, and it appears reasonable that a figure of EUR 5,000.00 be awarded

to Claimant.

65. As the arbitration costs are fixed by the BAT President at EUR 5,550.00 and the total sums paid to BAT (excluding the non-reimbursable fee of EUR 2,000 which will be taken into account when determining Claimant's legal fees and expenses) were EUR 7,000.00 that leaves a figure of EUR 1,450.00 which can be repaid to Claimant.

66. The Arbitrator decides that in application of article 17.3 of the BAT Rules:

(i) BAT shall pay EUR 1,450.00 to Claimant by way of reimbursement; and

(ii) Respondent shall pay to Claimant an amount of EUR 5,550.00 being the difference between the costs advanced by her (EUR 7,000.00) and the amount she is going to receive in reimbursement from the BAT.

(iii) Respondent shall pay to Claimant EUR 7,000.00 (EUR 5,000 + EUR 2,000) representing the amount of her legal fees and other expenses.

8. AWARD

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

1. **Beşiktaş Jimnastik Kulübü Dernegi shall pay Ms. Sandra Mandir the amount of EUR 45,748.50.**

2. **Beşiktaş Jimnastik Kulübü Dernegi shall pay Ms. Sandra Mandir interest at 5% per annum as follows:**

    - **on EUR 11,000.00 from 1 November 2009 to 11 November 2009;**
    - **on EUR 862.12 from 11 November 2009;**
    - **on EUR 11,000.00 from 1 December 2009 to 19 January 2010;**
    - **on EUR 876.38 from 19 January 2010;**
    - **on EUR 11,000.00 from 31 December 2009 to 12 March 2010;**
    - **on EUR 11,000.00 from 1 February 2010;**
    - **on EUR 11,000.00 from 1 March 2010;**
    - **on EUR 11,000.00 from 1 April 2010; and**
    - **on EUR 11,000.00 from 1 May 2010.**

3. **Beşiktaş Jimnastik Kulübü Dernegi shall pay Ms. Sandra Mandir an amount of EUR 5,550.00 as reimbursement of arbitration costs.**

4. **Beşiktaş Jimnastik Kulübü Dernegi shall pay Ms. Sandra Mandir an amount of EUR 7,000.00 as a contribution towards her legal fees and expenses.**

5. All other or further requests for relief are dismissed.

Geneva, seat of the arbitration, 29 April 2011

Klaus Reichert
Arbitrator