BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0129/10)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr. Leonardo G. Pomare

- Claimant -

represented by Mr. Justin Haynes,
Worldwide Hoops LLC, 1804 Willow Avenue 5s, Weehawken, NJ 07086, USA

vs.

Gaz Metan Medias
Piata Regele Ferdinand nr. 12, 551002 Medias, Romania

- Respondent -

1. The Parties

1.1. The Claimant

1. Mr. Leonardo G. Pomare (hereinafter “Player” or “Claimant”) is a professional basketball player. He is represented by Mr. Justin Haynes, FIBA licensed agent and president of the sports and entertainment company Worldwide Hoops LLC which is located in Weehawken NJ, USA.

1.2. The Respondent

2. Gaz Metan Medias (hereinafter “Club” or “Respondent") is a professional basketball club with its seat in Medias, Romania. Respondent is represented by its president Mr. Cindrea Corin.

2. The Arbitrator

3. On 12 November 2010, the President of the Basketball Arbitral Tribunal (the "BAT") appointed Dr. Stephan Netzle as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules").

4. Neither of the Parties has raised objections to the appointment of the Arbitrator or to the declaration of independence rendered by him.

3. Facts and Proceedings

3.1. Background Facts

5. On 16 August 2010, Claimant and Respondent signed an employment contract (hereinafter referred to as the "Player Contract") according to which Claimant was employed by Respondent as a basketball player for the 2010-2011 season. According to Article II, the Player Contract entered into force on the date of signature and would end on 31 May 2011.

6. Article III of the Player Contract reads as follows:

> *"III. GUARATEED NO-CUT CONTRACT*
>
> *The Club agrees that this contract is no-cut, which means that neither the Club nor any assignee thereof, nor the League can terminate this contract should any injury or illness befall the Player or in the event the Player fails to reach an expected level of performance."*

7. Pursuant to Article IV of the Player Contract, Respondent undertook to pay to Claimant a total net salary of USD 65,000.00, payable in certain defined installments. It is undisputed that to date, Respondent has paid to Claimant only an amount of USD 6,500.00.

8. After participating in pre-season trainings and pre-season matches, the Parties had several discussions about the Player's allegedly unsatisfying performance and an early termination of the Player Contract. As a matter of fact and for reasons which are disputed in this arbitration, the Player did not participate in the team's regular trainings or matches once the season had started.

9. The Player says that he was given two options, namely to terminate the Player Contract against a settlement payment of USD 6,500.00 or to stay with the Club and receive the agreed salary but without the opportunity to practice or play. That second option was later withdrawn and the Player was forced to leave the country.

10. The Club says that the Player violated his duties under the Player Contract because he was not fit to play and he missed the practices and certain games. He was repeatedly warned and eventually dismissed.

11. On 8 October 2010, the Player left Romania and returned to the USA. At the end of October 2010, the Player signed an employment contract with the Argentinean basketball club "Club 9 de Julio" beginning on 31 October 2010. Meanwhile, he has left the basketball club "Club 9 de Julio" club in December 2010 after having received salaries in a total amount of USD 6,000.00.

12. The Player is requesting the outstanding salaries under the Player Contract, and the agent fee. The Club denies any obligation to make any payments to the Player.

3.2. The Proceedings before the BAT

13. On 6 October 2010, Claimant's counsel filed a Request for Arbitration in accordance with the BAT Rules, which was received by the BAT on the same day.

14. By letter dated 12 November 2010, the BAT Secretariat confirmed receipt of the Request for Arbitration as well as the payment of the non-reimbursable handling fee of EUR 1,976.61 received in the BAT bank account on 18 October 2010 and informed the Parties about the appointment of the Arbitrator. Furthermore, a time limit was fixed for Respondent to file its Answer to the Request for Arbitration in accordance with Article 11.2 of the BAT Rules by no later than 3 December 2010 (hereinafter the "Answer"). The BAT Secretariat also requested the Parties to pay the following amounts as an Advance on Costs by no later than 26 November 2010:

"Claimant (Mr. Leonardo G. Pomare)	*EUR 3,000*
Respondent (Gaz Metan Medias)	*EUR 3,000"*

15. By letter of 7 December 2010, the BAT Secretariat acknowledged receipt of Claimant's share of the Advance on Costs in an amount of EUR 2,985.45 on 29 November 2010. The BAT Secretariat also acknowledged receipt of Respondent's Answer and informed the Parties that Respondent had failed to pay its share of the Advance on Costs. Furthermore, the BAT Secretariat noted that in accordance with Article 9.3 of the BAT Rules the arbitration would not proceed until the full amount of the Advance on Costs was received. Therefore, Claimant was requested to effect payment of Respondent's share of the Advance on Costs by no later than 20 December 2010.

16. By letter of 11 January 2011, the BAT Secretariat acknowledged receipt of the full amount of the Advance on Costs. In the same letter, Claimant and Respondent were requested to submit further information and documents by no later than 21 January 2011. Claimant filed his personal statement in time while Respondent failed to submit the requested documents.

17. By letter of 27 January 2011, the Arbitrator invited Respondent to submit its comments on Claimant's personal statement by no later than 7 February 2011 and declared that after the receipt of Respondent's comments the exchange of documents would be completed. The Arbitrator also invited the Parties to submit a detailed account of their costs until 7 February 2011.

18. On 7 February 2011 Respondent filed several documents, including payment receipts, with the BAT.

19. On the same date, Claimant submitted an account of costs as follows:

> *"The following is the payments made by Mr. Leonardo Pomare in the Pomare vs Gaz Metan Medias [I-FAT.FID835] case. The payments include the Request for Arbitration costs and both Advance on Costs (for the Claimant and Respondent).*

1. *The Request for Arbitration Non-Reimbursable Fee of EUR 1,976.61 (Notification email of payment received: 19 October 2010)*

2. *Claimant's Share of the Advance on Costs in the amount of EUR 2,985.45" (Notification email of payment received: 02 December 2010)*

3. *Respondent's Share of the Advance on Costs in the amount of USD 3,970.00" (Notification email of payment received: 03 January 2011)"*

20. Respondent did not submit an account of costs.

21. Respondent was invited to submit its comments, if any, on Claimant's account of costs by no later than 18 February 2011. By email of 18 February 2011, Respondent commented as follows:

> *"Dear lady,*
> *Regarding this letter we don't have any comment to do.*
> *The Arbitrator will give us the solution to our problem.*
> *Yours sincerely,*
> *CS Gaz Metan"*

22. By letter dated 4 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.

23. In the Request for Arbitration, Claimant requested the BAT to hold a hearing and that he should be examined as a witness. The Arbitrator decided in accordance with Article 13.2 of the BAT Rules not to hold a hearing and to deliver the award on the basis of the written submissions of the parties but invited the Claimant to submit a written "personal statement" which he did within the time limit determined by the Arbitrator.

4. The Parties' Submissions

4.1. Summary of Claimant's Submissions

24. Claimant's primary wish is to stay with the Club's team and to play under the agreed terms of the Player Contract. If this were not accepted by the Club, Claimant requests payment of salaries, agent fee and arbitration costs in a total amount of USD 68,000.00.

25. Claimant submits that, starting in September 2010, the Club made efforts to release him due to poor performance. Because the Player Contract was agreed as a "guaranteed no-cut contract" the Club offered two options to the Player:

    a. The first option was to mutually terminate the Player Contract against a settlement payment to the Player in the amount of USD 6,500.00. This was documented by a "Settlement Agreement" signed by the Club but not by the Player.

    b. The second option was that the Player would stay with the Club and receive the agreed salaries, but would have to stay out of practices and matches. On 29 September 2010, the Club allegedly changed its position on the second opinion and informed the Player that his apartment would no longer be paid by the Club and that the Player should leave Romania immediately.

26. When the Player informed the Club's general manager, Mr. Lucian Patrascu, that he did not accept the settlement offer, Mr. Patrascu announced that he would inform FIBA that the Player had not participated in the practice sessions and that he breached the Player Contract.

27. On 7 October 2010, the Club's president and the general manager Mr. Patrascu

submitted two documents to the Player: The first ("DECISION no. 41") was dated 29 September 2010 and contained a warning because the Player had not attended certain training sessions and matches. The second ("DECISION No. 42") was dated 05 October 2010 and was actually a notice of termination of the Player Contract because the Player had continued not to attend training sessions and matches. The Claimant says that he signed those documents only to confirm receipt thereof but not to demonstrate his agreement with their content.

28. Claimant also submits that he has repeatedly asked the Club to allow him to return to practice but the Club always denied his requests.

4.2. Claimant's Request for Relief

29. Claimant submits the following requests for relief:

> *"It is the player's request to stay with the team and play under the agreed terms in the contract. If the team does not allow this, then he is requesting to receive the rest of the money owed in the contract ($58,500 USD + $6,500 agent fee + 2000 EUR FIBA arbitration costs = $68,000 USD)."*

4.3. Summary of Respondent's Submissions

30. Respondent rejects all claims raised by the Player because they are "unjustified", "ungrounded" and "illegal" and the Claimant's statement of the facts is "unreal" and only an act of "bad faith".

31. Respondent submits that since the beginning of the contractual period, the Player showed an inappropriate attitude and missed practices and official matches without justification. The Club's head coach, Mr. Bruno Soce, and his assistant, Mr. Ovidiu Teleaba, informed the Club's management in three reports (dated 14, 23 and 27

September 2010) about the Player's failure to report to the team's reunion on 13 September 2010, to attend official matches on 22 and 26 September 2010 and to participate in several training sessions during the period from 13 until 27 September 2010. Furthermore, the Player did not attend the official match on 2 October 2010 and the previous training session on the same day.

32. On 29 September 2010, the Club decided to sanction the Player with a written warning because he did not comply with the conduct and discipline rules as stated in the Player Contract (Article VIII, par. 5, no. 2 of the Player Contract: "Uncountable absence from a training session"), and issued the "DECISION no. 41 / 29.09.2010". Because the Player did not change his attitude, the Club issued the "DECISION no. 42 / 05.10.2010" by which the Player Contract was terminated because of repeated (more than twice) violation of the Player's contractual obligations as set out in Article VIII, par. 6 of the Player Contract

33. Respondent concludes that the early termination of the Player Contract without further payments was a justified measure. Respondent also submits that the Player's attitude had "endangered the result of the team in very important games".

4.4. Respondent's Request for Relief

34. Respondent submits the following requests for relief:

> *"As a consequence, we request all claims raised by the Claimant in the Arbitration Request to be rejected, as they are ungrounded and illegal claims, that have no contractual support, the situations brought up by the Claimant aren't according to real facts; they are only acts of bad faith."*

5. Jurisdiction

35. 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).

36. The jurisdiction of the BAT presupposes the arbitrability of the dispute as well as the existence of a valid arbitration agreement between the parties.

5.1. Arbitrability

37. The Arbitrator notes that the dispute referred to him is clearly of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.[1]

5.2. Formal and substantive validity of the arbitration agreement

38. The existence of a valid arbitration agreement will be examined in light of Article 178 PILA, which reads as follows:

> *"1 The arbitration agreement must be concluded in writing, by telegram, telex, telefax or any other means of communication which allow proof of the agreement by text.*

[1] Decision of the Swiss Federal Tribunal 4P.230/2000 dated 7 February 2001, cons. 1, reported in ASA Bulletin 2001, p. 523 et seq., with reference to the decision of the Swiss Federal Tribunal dated 23 June 1992, BGE 118 II 353, 356, cons. 3b.

2 Furthermore, the arbitration agreement shall be valid if it conforms to the law chosen by the parties, to the law governing the dispute, in particular the principal contract, or to Swiss law."

39. The Arbitrator finds that the jurisdiction of the BAT over the dispute between Claimant and Respondent results from Article XI of the Player Contract which reads as follows:

> *"In case of disputes on the present Contract, the parties will take all measures to solve them by negotiations, recognizing that the arbitration of disputes is a costly and time consuming endeavor. Failing a negotiated resolution, any dispute arising from or related to the present Contract shall be submitted to the FIBA Arbitration Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the then prevailing version of the FAT Arbitration Rules by a single arbitrator appointed by the FAT President.*
> *The seat of the arbitration shall be Geneva, Switzerland or elsewhere as agreed by the parties and the arbitrator. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' domicile.*
> *All submissions and proceedings shall be in English. In accord with Articles 17 and 18 of the FAT Arbitration Rules, the parties' rights of appeal are limited.*
> *The parties waive recourse to the Swiss Federal Supreme Court and Cantonal Courts, except as to apply for formal recognition and enforcement pursuant to the New York Convention of June 10, 1958.*
> *The FAT arbitrator and the CAS on appeal shall decide the dispute ex aequo et bono. In the event that a party to a FAT arbitration or CAS appeal fails to honor the final award or any provisional or conservatory measure, the party seeking enforcement shall have the right to request appropriate sanctions from the FIBA Secretary General as provided in Rule L 2.7 of the FAT Arbitration Rules, including attorney's fees and costs therefore."*

40. The Player Contract is in written form and thus the arbitration agreement fulfills the formal requirements of Article 178(1) PILA.

41. With respect to substantive validity, the Arbitrator considers that there is no indication in the file which could cast doubt on the validity of the arbitration agreement under Swiss law (cf. Article 178(2) PILA). In particular, the wording *"any dispute arising from or related to the present Contract"* in Article XI of the Player Contract clearly covers the present dispute.

42. The jurisdiction of BAT has not been disputed by Respondent.

43. The Arbitrator thus finds that he has jurisdiction to decide the claims of Claimant.

6. Applicable Law – *ex aequo et bono*

44. 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",* as opposed to a decision according to the rules of law referred to in Article 187(1) PILA. Article 187(2) PILA is generally translated into English as follows:

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

45. In their arbitration agreement in Article XI of the Player Contract, the Parties have explicitly directed and empowered the Arbitrator to decide the dispute *ex aequo et bono*. Furthermore, in Article XII of the Player Contract, the Parties have explicitly agreed on the doctrine of *ex aequo et bono* as the applicable law (*"This contract shall be interpreted and enforced in accordance with the doctrine of ex aequo et bono, with reference in the parties' dealings to the private international law of Switzerland"*). Consequently, the Arbitrator will decide the present matter *ex aequo et bono*.

46. 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* of 1969[2] (Concordat),[3] under

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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] KARRER, in: Basel commentary to the PILA, 2nd ed., Basel 2007, Article 187 PILA N 289.

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]

47. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives

> *"the mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he must stick to the circumstances of the case at hand".*[5]

48. 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".*

49. In light of the foregoing developments, the Arbitrator makes the following findings:

7. Findings

50. It is undisputed that the parties have concluded a Player Contract with a fixed term and that the Club could not terminate this contract if the Player was injured, became sick or if he did not reach the expected level of performance. The only reason for an early termination is stipulated in Article VIII of the Player Contract which says that the Club was entitled to terminate the Player Contract without further payments if the Player

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4 JdT (Journal des Tribunaux), III. Droit cantonal, 3/1981, p. 93 (free translation).

5 POUDRET/BESSON, Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.

repeatedly breached certain defined obligations such as “uncountable absence from a training session”, “delay in attending a game”, “uncountable absence from a game”, “improper conduct” (conflicts between Players of the same team), and others “repeated more than twice”. The burden of proof to demonstrate that the Player violated one of the defined obligations and that such violation was “repeated more than twice” lies with the Club.

51. Respondent says in its termination notice (“DECISION no. 42”) that the Player Contract was terminated because of “repeated violations of more than two times, according to Cap. VIII paragraph 6” of the contract and lists a number of official games and training sessions which the Player did not attend. It further alleges that prior to termination the Player was warned in writing and that therefore, the requirement that any breaches be “repeated more than twice” as set out in article VIII of the Player Contract was met.

52. The Arbitrator does not share this opinion because of the following findings:

a. Claimant does not contest that the Club was not satisfied with his performance on the court. The Arbitrator finds Claimant’s statement credible according to which the Club intended to release Claimant but could not do so because of the clear text of Article III of the Player Contract which prohibited an early termination of the employment “in the event the Player fails to reach an expected level of performance.”

b. It is evident that the Club decided to renounce Player’s services and to make a written proposal for a mutual dissolution of the Player Contract which included the payment of USD 6,500.00 as settlement of accounts. This settlement proposal dates from 6 October 2010 (as confirmed by Claimant) and was signed by the Club’s president. The settlement proposal was not accepted by Claimant. However, there is no evidence that Respondent offered a second option to Claimant, namely to abstain from training and matches and still

obtain the contractual salaries.

c. The next day (i.e. on 7 October 2010 as demonstrated by Claimant's dating and signing), Respondent confronted Claimant with a written reprimand (DECISION no. 41/29.09.2010) and a termination notice (DECISION no. 42/05.10.2010). It seems to the Arbitrator that these two documents were handed out to Claimant to enforce his leave only after he had refused to accept the proposal of a mutual dissolution of the Player Contract.

d. The written reprimand and the termination notice refer to the notifications dated 14 September 2010, 23 September 2010 and 27 September 2010, are signed by the assistant coach and indicate that the Player missed certain training sessions and games[6]. However, there is no evidence that either these reports or the reprimand were notified to the Player before he refused to accept the settlement proposal.

e. The Arbitrator concludes therefore that (i) the Player had not met the expectations of the Club on the court, (ii) he was excluded from training and playing matches, (iii) he was offered an early termination of his Player Contract because of his unsatisfying performance, (iv) he did not accept the Club's settlement offer and (v) he was then confronted with the reprimand and termination notice.

53. As a consequence, the Arbitrator finds *ex aequo et bono* that it was the Club's own decision to exclude Claimant from training and matches. The Club was therefore not entitled to terminate the Player Contract based on grounds which were actually created by the Club itself *(venire contra factum proprium)*. The Arbitrator also finds that the

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6 Despite an explicit request of the Arbitrator, no English translations of the Romanian text of these notes have been provided to the BAT.

Club did not act in good faith when it pulled those allegations out of the hat only after the Player refused to accept the early termination proposal.

54. After receiving the termination notice, the Player decided to join another team and to play in South America. The Club apparently did not object to said transfer and therefore the Player Contract, at the latest by that time, was actually terminated. The Player Contract can therefore not be restored and the Arbitrator cannot oblige the parties to continue their relationship on the basis of the Player Contract since Respondent repeatedly and explicitly stated that it did not wish to rely on the Player's services any longer. However, since Respondent's termination of the Player Contract was unjustified, Claimant remains entitled to damages which correspond to the amount which the Player would have earned if the Player Contract had not been terminated. This amount became due for payment upon termination of the Player Contract. From this amount, any income earned by the Player during the agreed term of the Player Contract must be deducted. According to Claimant, he has earned USD 6,000.00 in Argentina. Claimant is therefore entitled to USD 52,500.00.

55. Claimant also requests the payment of an agent fee in the amount of USD 6,500.00. However, the Request for Arbitration does not indicate on which legal grounds this agent fee is claimed or whether this fee is owed to the Player rather than to a third person, namely his agent, who is not a party to this arbitration. Also, the Player Contract does not provide for the payment of any agent fee. Claimant's request for the payment of an agent fee must therefore be dismissed.

8. Costs

56. 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 states that the award shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

57. On 4 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 at EUR 4,940.00.

58. In the present case, in line with Article 17.3 of the BAT Rules and considering that Claimant prevailed in approximately 80% of his claim, the Arbitrator finds it fair that 80% of the fees and costs of the arbitration be borne by Respondent and 20% by Claimant.

59. Given that Claimant paid the totality of the Advance on Costs of EUR 5,939.05, the Tribunal decides that:

(i) The BAT shall reimburse EUR 999.05 to Claimant.

(ii) Respondent shall pay to Claimant 80% of the difference between the costs advanced by Claimant and the amount which is going to be reimbursed to him by the BAT, i.e. EUR 3,952.00.

(iii) Furthermore, the Arbitrator considers it adequate that Claimant is entitled to the payment of a contribution towards his legal fees and other expenses (Article 17.3. of the BAT Rules). The Arbitrator holds it adequate to take into account the non-reimbursable handling fee of EUR 1,976.61 when

assessing the expenses incurred by Claimant in connection with these proceedings. Claimant has not requested the reimbursement of any other legal costs. After having reviewed and assessed all the circumstances of the case at hand, the Arbitrator fixes the contribution towards Claimant's legal fees and expenses at EUR 1,581.29.

9. AWARD

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

1. **Gaz Metan Medias is ordered to pay to Mr. Leonardo G. Pomare the amount of USD 52,500.00.**

2. **Gaz Metan Medias is ordered to pay to Mr. Leonardo G. Pomare the amount of EUR 3,952.00 as a reimbursement of the advance on arbitration costs.**

3. **Gaz Metan Medias is ordered to pay to Mr. Leonardo G. Pomare the amount of EUR 1,581.29 as a contribution towards his legal fees and expenses.**

4. **Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 12 April 2011

Stephan Netzle
(Arbitrator)