BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0150/10)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert SC

in the arbitration proceedings between

Mr. Larry Dominick Owens

- Claimant -

vs.

Turk Telekom Genclick ve Spor Kulubu

- Respondent -

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1. The Parties

1.1 The Claimant

1. Mr. Larry Dominick Owens ("Claimant") is a professional basketball player. He is represented in this Arbitration by Mr. Guillermo López Arana and Mr. Mikel Abete Vecino, U1st Sports, C/ Maestro Ripoll 9, 28006 Madrid, Spain.

1.2 The Respondent

2. Turk Telekom Genclick ve Spor Kulubu ("Respondent") is a professional basketball club with its address at Turgut Ozal Bulvari, Aydinlikevler, 06103 Ankara, Turkey. It is represented in this arbitration by Mr. Ramis Onur Yeni, ROY Law Office of Istanbul, Turkey.

2. The Arbitrator

3. On 15 December 2010, the President of the Basketball Arbitral Tribunal (the "BAT") appointed Mr. Klaus Reichert SC 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 any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Agreement and the Background Facts

4. On 27 June 2010, Claimant and Respondent entered into an agreement whereby the latter engaged Claimant for the season 2010-2011 ("the Agreement"). It was to commence on 2 August 2010 and terminate on the fifth day after the final official game of the season. The Agreement was fully guaranteed but had an initial requirement for the passing of a medical examination.

5. Article 2 of the Agreement provides for payments to be made to Claimant in a total amount of USD 250,000.00 net of all Turkish taxes and charges. This amount was to be paid in stages starting with USD 40,000.00 on 15 August 2010 following the passing of "the Physical Test" and thereafter on the 15th of each month a sum of USD 21,000.00 was to be paid up to and including 15 June 2011.

6. Article 4 of the Agreement provides, amongst many things, that it is a "one (1) year, no-cut guaranteed agreement". Article 4 also provides that if a scheduled payment is not received within 30 days of the due date, Claimant's performance obligations "shall cease". Claimant also has the right, in such circumstances, to terminate the Agreement and "accelerate all future payments required under this Agreement and Player shall be immediately and unconditionally free to leave Turkey". Claimant was required to inform Respondent by email or fax by his Agent.

7. Claimant says that he received USD 40,000.00 from Respondent following the passing of the medical examination and then USD 21,000.00 on 15 September 2010.

8. Claimant says that his Agent received a letter dated 28 October 2010 from Mr Yeni on behalf of Respondent terminating the Agreement with immediate effect.

3.2 The Proceedings before the BAT

9. On 7 December 2010, Claimant filed a Request for Arbitration in accordance with the BAT Rules and paid the majority of the non-reimbursable handling fee of EUR 3,000.00 (a remaining amount of EUR 88.34 was added to Claimant's share of the Advance on Costs).

10. On 20 December 2010, the BAT informed the Parties that Mr. Klaus Reichert SC had been appointed as the Arbitrator in this matter and fixed the advance on costs to be paid by the Parties as follows:

> *"Claimant (Mr. Larry Dominick Owens) € 4,588.34*
> *Respondent (Turk Telecom Genclick ve Spor Kulubu)) € 4,500.00"*

11. On 23 December 2010 and 10 January 2011 respectively, Claimant and Respondent each paid their part of the foregoing advance on costs.

12. On 14 January 2011, Respondent submitted its Answer.

13. By Procedural Order of 19 January 2011, the Parties were informed that Claimant had a right to comment on the Answer by no later than 2 February 2011. Claimant did so on 2 February 2011.

14. On 4 February 2011 Respondent was informed that it had the right to comment on Claimant's communication of 2 February 2011 by no later than 18 February 2011. Respondent did not do so by that date.

15. By Procedural Order of 23 February 2011 the Parties were informed that the exchange of documents was completed and asked for a detailed account of costs by 28 February 2011.

16. Claimant filed an account of costs on 1 March 2011. Respondent filed an account of costs dated 28 February 2011. In the absence of any objections by the Respondent, the Arbitrator decided to admit Claimant's account of costs on file.

17. Respondent was afforded the opportunity to comment on Claimant's account of costs by no later than 7 March 2011. Respondent did not do so.

18. 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, absent any objections by either party on or before 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.

19. By Procedural Order of 18 April 2011, the Parties were informed as follows:

> *"the Claimant is herewith requested to submit by no later than Friday, 29 April 2011 copies of the contracts he entered into with NBA/NBADL teams or any other team/entity from 16 October 2010 until today. Once the documents are received by BAT, they will be forwarded to the Respondent, which will then have the right to file its comments within a deadline of 7 days from receipt thereof."*

20. On 29 April 2011 Claimant forwarded the relevant copies of the contracts he entered into with NBA/NBADL teams.

21. By email dated 4 May 2011, Respondent was afforded the opportunity to comment and to do so by no later than 11 May 2011. Respondent did not comment by that time.

4. The Positions of the Parties

4.1 Claimant's Position in the Request for Arbitration

22. Claimant's position, as set out in the Request for Arbitration, is simple. The Agreement was terminated by Respondent on 28 October 2010 and he is owed the balance of the payments due together with an outstanding balance from the first instalment. In short, Claimant says that Respondent has not paid him the debt it owes. This situation arises from the failure by Respondent to adhere to the agreed timetable for the payment of Claimant's salary.

23. The Request for Arbitration seeks payment of USD 189,000.00 net plus all costs of this Arbitration.

4.2 Respondent's Position and Claimant's Reply

24. Respondent's position is that Claimant insisted on acting contrary to his obligations. It says on 20, 21, 25 and 26 October 2010 the non-attendance of Claimant was reported by three of the assistant coaches, head coach and administrative manager. Attached to the Answer is a document signed by nine people stating that Claimant has not been participating "to team practises, meetings and other activities". That document is stated to be dated 20 October 2010. Respondent says that Claimant went back to the USA and has not returned to Turkey. It also says that no notification was given to it before Claimant left Turkey. Finally, it says that the unilateral termination of the Agreement "finds its legal roots in the events and documents abovementioned, which has been signed by the claimant". Respondent then asks for the claim to be dismissed and costs to be awarded to it.

25. Claimant, in reply, says that on 16 October 2010 his Agent informed Respondent that the Agreement was being terminated due to a failure to pay the 15 September 2010 milestone salary payment. The 15 September 2010 payment was received on 18 October 2010 but, according to Claimant, this was too late and the Agreement had been terminated at that stage. He also says that no issue was taken with him prior to his Agent notifying Respondent (as above). Once the termination notice was issued (16 October 2010) Claimant says that Respondent's attitude changed and they did not want him on the team anymore. Finally he says he left on 31 October 2010 and that Respondent had, in fact, made the travel arrangements.

5. The jurisdiction of the BAT

26. 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).

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

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) PILA[1].

29. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in Article 8 of the Agreement, which reads as follows:

"Any dispute arising or related to the present contract shall be submitted to the FIBA

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

> *Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT Arbitration Rules by a single arbitrator appointed by the FAT 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 (PIL), irrespective of the parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono. Club, Player and Agent agree that the FAT ruling shall be final and cannot be appealed."*

30. The reference to FAT is the name by which BAT was formerly known until the nomenclature was changed with effect from 1 April 2011. This is also confirmed by Article 18.2 of the BAT Rules which provides that "Any reference to BAT's former name "FIBA Arbitral Tribunal (FAT)" shall be understood as referring to the BAT."

31. The Agreement is in written form and thus the arbitration agreement 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 that could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA).

33. The jurisdiction of BAT over the Player's claim arises from the Agreement. The wording "[a]ny dispute arising from or related to the present contract …" clearly covers the present dispute. Furthermore, Respondent specifically asked, in the Answer, the Arbitrator to reject the claim and award it costs, thus accepting BAT's jurisdiction.

34. For the above reasons, the Arbitrator has jurisdiction to adjudicate upon Claimant's claim.

6. Discussion

6.1 Applicable Law – ex aequo et bono

35. 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 is generally translated into English as follows:

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

36. 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."*

37. Article 8 of the Agreement provides that the Arbitrator shall decide the dispute ex aequo et bono. Consequently, the Arbitrator shall decide ex aequo et bono the issues submitted to him in this Arbitration.

38. 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'arbitrage2 (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]

39. 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".

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

6.2 Findings

41. Respondent was late in its payment to Claimant which was due on 15 September 2010. It should have been paid on 15 September 2010 but was not paid. Respondent agreed with Claimant on the timetable of payments when it signed the Agreement and it must be taken to have fully understood the consequences of that bargain.

42. Claimant's Agent duly sent a termination email on 16 October 2010 in accordance with the Agreement. From that moment the Agreement stood terminated. The Agreement's provisions, at that moment, triggered payment of the entirety of the contractual amounts. This is the foundation for Claimant's claim. The Arbitrator finds that Claimant (through his Agent) was entitled to send the termination email on the day that he did by reason of the overdue payment.

43. While the payment which was due on 15 September 2010 arrived on 18 October 2010, at that point the die was cast by the termination email of two days previously.

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

Claimant's rights had crystallised and there was no winding-back of the clock, save if the Parties agreed otherwise.

44. The matters raised by Respondent were, it seems clear on the basis of the record submitted to the Arbitrator, done as a reaction to Claimant's termination notice and his desire to be paid. These matters, however, do not provide a defence to Claimant's claims. The termination notice of 16 October 2010 trumps Respondent's reaction and its own termination letter.

45. Deciding *ex aequo et bono*, the Arbitrator finds that Claimant therefore succeeds in his claim. However, in line with established BAT case law and practice, the value of that claim has to take into account subsequent contractual payments which Claimant received during the course of the relevant season. There were three sums involved: USD 22,287.00; USD 19,000.00; and USD 27,859.00. This comes to a total of USD 69,146.00. This total figure is thus to be subtracted from USD 189,000.00, yielding a net figure to which Claimant is entitled of USD 119,854.00.

7. Costs

46. 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 reasonable legal fees and expenses incurred in connection with the proceedings.

47. On 30 June 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 3,285.00.

48. Considering, that Claimant prevailed in his claim, it is fair that the fees and costs of this Arbitration be borne by Respondent and that it (Respondent) be required to cover its own legal fees and expenses as well as those of the Claimant, the latter being reasonable in amount (EUR 3,865.00) in proportion to the sums claimed.

49. Given that Claimant paid an advance on costs of EUR 4,500.00 as well as a non-reimbursable handling fee of EUR 3,000.00, the Arbitrator decides that in application of article 17.3 of the BAT Rules:

(i) BAT shall reimburse EUR 4,500.00 to the Claimant as reimbursement for the payment of his share of the advance of costs;

(ii) BAT shall reimburse to the Respondent EUR 1,215.00 being the difference between its share of the advance of costs and the arbitration costs fixed by the BAT President;

(iii) Respondent shall pay to the Claimant EUR 6,865.00 (EUR 3,000.00 for the non-reimbursable fee and EUR 3,865.00 for legal fees) representing the amount of his legal fees and other expenses.

8. AWARD

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

1. **Turk Telekom Genclick ve Spor Kulubu shall pay Mr. Larry Dominick Owens USD 119,854.00, net of taxes, as compensation for breach of contract.**

2. **Turk Telekom Genclick ve Spor Kulubu shall pay Mr. Larry Dominick Owens an amount of EUR 6,865.00 as reimbursement for his legal fees and expenses.**

3. **Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 7 July 2011.

Klaus Reichert SC

(Arbitrator)