BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0188/11)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert SC

in the arbitration proceedings between

Mr. Fedor Likholitov

Represented by Mr Vadim Mikhalevskiy, Rosette International Group ltd.,
72 Lusinovskaya str., office 123, Moscow 115162, Russia

- Claimant -

vs.

Besiktas Jimnastik Kulubu

Suleyman Seba Caddesi, No. 48 BJK Plaza, Akaretler, Besiktas,
34357 Istanbul, Turkey

Represented by Ms Basak Akbas, attorney at law in Istanbul, Turkey

- Respondent -

1. The Parties

1.1 The Claimant

1. Mr. Fedor Likholitov (hereinafter also referred to as “the Player”) is a professional basketball player, who played the 2010-2011 season for the basketball club Besiktas Jimnastik Kulubu.

1.2 The Respondent

2. Besiktas Jimnastik Kulubu (hereinafter also referred to as “the Club”) is a professional basketball club competing in the Turkish professional basketball league.

2. The Arbitrator

3. On 23 June 2011, 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 Dispute

4. On 1 July 2010, the Player and the Club entered into an agreement whereby the latter engaged the Player for the season 2010-2011 (the "Agreement").

5. Article 2 of the Agreement provides that it is a "no cut contract".

6. Article 4 of the Agreement provides for the payment of the Player's salary (total base salary of $400,000.00) in ten instalments according to a schedule of payments running between 28 August 2010 (first instalment) and 28 May 2011 (last instalment). The first instalment was $85,000.00. Each of the following nine instalments was $35,000.00.

7. Article 4 also sets out an obligation on the Club's part to provide living accommodation for the Player up to a maximum of $1,300.00 per month – any rent figure beyond that amount was the Player's responsibility.

8. The Agreement also confirmed an obligation on the Club's part in respect of the 2009-2010 season towards the Player in the amount of $56,500.00.

9. According to the Player, his dispute with the Club arises from a failure to pay three and a half of the instalments and eight months of rent (paragraph 2.2.3 of the Request for Arbitration). The figure is put at $150,400.00 broken down (paragraph 3 of the Request for Arbitration) as $140,000.00 being the outstanding salary and $10,400.00 being outstanding rent payments.

10. The Player says that the Club has ignored his demands, which has led to this arbitration.

11. The Player also advances a claim framed as fundamental breach of contract seeking $20,000.00. He seeks interest and costs.

12. The Club, in this arbitration, has admitted the existence of the Player's claim for $140,000.00 and its liability for rental debts of $10,400.00. It blames the economic crisis for not paying him. It, however, disputes the entitlement of Player to pursue a claim for damages for $20,000.00. Further, it challenges the claim for interest.

3.2 The Proceedings before the BAT

13. On 7 June 2011, the Player filed a Request for Arbitration in accordance with the BAT Rules and duly paid the non-reimbursable handling fee of EUR 2,967.50.

14. On 28 June 2011, 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.Fedor Likholitov)	*EUR 4,500*
Respondent (Besiktas JK Istanbul)	*EUR 4,500"*

15. On 8 July 2011 the Player paid his share of the advance on costs. On 28 July 2011 the Parties were informed by the BAT that the Club had not paid its share of the advance on costs and the Player was invited to make that payment. This was paid on 4 August 2011 by the Player.

16. On 19 July 2011, the Club submitted its Answer to the Request for Arbitration.

17. By procedural order of 16 August 2011, the BAT informed the Parties that a second exchange of briefs was required.

18. On 24 August 2011, the Player filed his comments on the Answer of the Club.

19. On 26 August 2011, the Club filed its reply to the Player's comments.

20. On 28 August 2011, the Player filed a copy of a loan agreement (in the Russian language). On 29 August 2011, the BAT invited the Claimant to provide a translation into English by 5 September 2011. This was done by that date and the Club was asked for its comments. The Club commented on the loan agreement on 12 September 2011 stating that it had nothing to do with the matter in hand.

21. On 12 September 2011, the Parties were informed that the exchange of documents was completed and the Parties were invited to submit their claims for costs by 19 September 2011. Both Parties did so before that deadline.

22. On 20 September 2011, the Parties were given the opportunity to file comments on the statement of costs of the other party and to do so before 26 September 2011. The Club commented in that respect on 26 September 2011.

4. The Jurisdiction of the BAT

23. 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).

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

25. 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].

26. The jurisdiction of the BAT over the dispute results from the arbitration clause contained under Article 6 of the Agreement, which reads as follows:

> *"In the event of any dispute in relation to this Agreement, Club agrees to contact Player's Representatives in an attempt to negotiate the dispute prior to taking any action.*
>
> *Any dispute arising from or related to the present contract shall be submitted to the FIBA 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."*

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

28. 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).

29. 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.

---

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

30. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Player's claim.

5. Discussion

5.1 Applicable Law – ex aequo et bono

31. 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".*

32. 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."*

33. Article 6 of the Agreement provides that: "[T]he arbitrator shall decide the dispute ex aequo et bono"

34. Consequently, the Arbitrator shall decide ex aequo et bono the issues submitted to him in this proceeding.

35. 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]

36. 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".

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

5.2 Findings

38. The Club has been frank in its admissions in this arbitration. It accepts that it owes $140,000.00 to the Player in respect of unpaid salary and also $10,400.00 in respect of its liability in relation to the rent for an apartment for the Player. Its explanation hinged upon the economic crisis and also it is suggested that it sought to pay the sums due in a staged process rather than in one go.

39. The only question that arises for the Arbitrator is therefore whether the Club had any legitimate reason not to pay such balance of the contractual salary and the sum related to rent.

---

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).

40. It is a universal principle and one deeply rooted in the most fundamental principles of good faith that parties should adhere to the bargain they strike – *pacta sunt servanda*. The Parties here bargained a particular way, namely stage payments for basketball services. The Club struck the bargain it did and must abide by its consequences and whilst economic crises are an unfortunate modern peril afflicting many, they do not provide a legitimate defence to a claim for contractually-due sums of money. The Player was entitled, as a matter of the bargain he struck with the Club, to be paid in accordance with the Agreement's terms. Inability to pay does not override, as a matter of justice and equity, the obligation to pay.

41. The positions of the Parties on the Player's claim for $140,000.00 (unpaid salary) and $10,400.00 (rent liability), in substance, reveal that there is no real dispute between them. The Club admits the existence of these claims and its liability for them. No further analysis is necessary. The Player has not been paid due and owing sums pursuant to the Agreement and the Club's liability is engaged.

42. The dispute between the Parties has, in reality, revolved around a different aspect of the Player's claim, namely seeking an amount of $20,000.00 for fundamental breach of contract. This is strenuously resisted by the Club.

43. The claim for fundamental breach is briefly asserted in the Request for Arbitration, but is developed further in the Player's Reply. He asserts that "by the action of non-payment of salary and rental payments the Respondent broke the essential clauses of the contract in general. Also, such actions of the Club to the Player resulted in great damages expressed in Player's non-fulfillment of his financial obligations before third parties. Since the Player, by signing the contract with the Club, expected full and timely fulfilment of financial obligations by the Club, he took financial obligations before the third parties, which he is not able to fulfil for the time being."

44. Fundamental breach is a concept known in many jurisdictions and, in general, means a

wrongful act by a party to a contract which is so serious that it deprives the non-breaching counterparty of the value of the bargain. The consequences of a fundamental breach vary but often one sees options being given to the innocent party including a right to terminate, or a right to claim damages. The contours of fundamental breach may vary having regard to the provisions of a particular contract and how parties structure their respective obligations. In the basketball context, the "no cut" provisions are of particular significance.

45. It is difficult to see what the Player has in mind in this arbitration when asserting a claim for fundamental breach. What occurred during the course of 2010-2011 does not constitute a fundamental breach on the part of the Club. It certainly performed part of its obligations with regard to several of the staged payments.

46. The alternative view which the Arbitrator has considered in relation to this claim is that the Player intended to mean that the Club has breached the Agreement in a serious way and that this has led to damage over and above the bargained-for salary payments. In support of his position, the Player submitted the Loan Agreement.

47. The Arbitrator has considerable difficulty in seeing how the Club could be found liable for damages which may have been suffered by the Player due to his own personal choices and/or his financial affairs. The Player's expectation of being paid is a legitimate one, but whether that expectation logically leads to, at the very least, an awareness on the part of the Club that he would rely upon payments dues from the Club to take out a loan is very difficult to establish. Nowhere does the Agreement reflect, nor is there any evidence tendered by the Player, that the Club knew of the Player's financial dealings with third parties and, further, that his obligations in that regard would be tied to the payments of his salary coming in on time. The Player may feel aggrieved that he has fallen behind in the servicing of his financial obligations vis a vis third parties, but that is not a liability which could reasonably attach to the Club save specific evidence that: (a) it had known of the Player's intentions in this regard; (b) the

Player specifically relied upon the payments from the Club in relation to his financial affairs, again with the knowledge of the Club; and (c) the Club had in some manifest way taken on the risk. It appears entirely contrary to both sound business sense and the justice surrounding contracts, that a basketball club would somehow become the effective guarantor of a player's financial dealings with third parties save in the most clear and specific cases.

48. With the foregoing in mind, the Player's claim for fundamental breach is dismissed.

49. The Player is also requesting the payment of interest on the sums owed at an annual rate of 5%.

50. Although the Agreement does not regulate interest for late payments, it is a generally recognized principle embodied in most legal systems, which is underpinned by motives of equity, that late payments give rise to interest – in order that the creditor be placed in the financial position she/he would have been in had payments been made on time. Consequently, and despite the Agreement not specifying an interest rate, it is normal and fair that interest is due on the late payments. Since the Player has invoked an interest rate of 5%, which in this case seems fair and reasonable and is in line with BAT jurisprudence, interest will be awarded at that rate.

51. It is an established principle that interest runs from the day after the date on which the principal amounts are due.

52. Consequently, it is fair that, with respect to the unpaid contractual monthly instalments making up the total of $140,000.00 owed to the Player, interest on each salary instalment provided in the schedule of payments in the Agreement be deemed to run from the day after the due date contractually stipulated for each instalment. As four months worth of instalments are due ($35,000.00 times 4 = $140,000.00) it seems that interest should run on $35,000.00 which was due on the fourth-last instalment

(February) as and from 1 March 2011. Interest should run on the March instalment of $35,000.00 as and from 29 March 2011. Interest should run on the April instalment of $35,000.00 as and from 29 April 2011. Finally, interest should run on the May instalment of $35,000.00 as and from 29 May 2011.

53. Interest is also sought on the figure of $10,400.00 (rent liability of the Club) as and from February 2011. Having carefully considered the justice and equity of the matter, interest at 5% will run on this sum from 29 May 2011 being the day after the last salary instalment was due to be paid.

6. Costs

54. 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.

55. On 9 December 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 6,050.00.

56. As part of the Player's claim for legal costs a figure of EUR 10,000.00 is claimed.

Supporting that claim is an invoice dated 6 September 2011 from Rosette International Group Limited, stated to be a BVI company, addressed to an entity, Velnar Trade LLP, stated to be situated in England. The bank details given are in Switzerland.

57. This claim for legal costs is rejected. Velnar Trade LLP has no connection whatsoever with this arbitration and its name does not appear anywhere on the evidence as having a legitimate (or any) connection with the legal representation for the claim being advanced by the Player. A debt, howsoever this might have arisen – and that is entirely unclear – owed by Velnar Trade LLP to Rosette International Group Limited is of no bearing on this arbitration.

58. It is also manifestly clear that Rosette International Group Limited is not a law firm. How it can invoice Velnar Trade LLP for legal services or assistance is impossible to fathom. The claim for EUR 10,000.00 is contrived and manifestly so. Such conduct cannot be condoned in BAT arbitration.

59. In the light of the failed claim for fundamental breach, and but much more particularly for the attempt by the Player to have the Club held liable for the supposed legal fees of EUR 10,000.00, the Arbitrator has decided to refuse to make any order for costs as against the Club. The only order which the Arbitrator will make is the reimbursement by BAT of the remaining sums held by it on foot of the advance on costs. The Player will not be granted any relief as against the Club in respect of the non-reimbursable handling fee.

60. The Arbitrator decides that in application of article 17.3 of the BAT Rules: BAT shall reimburse EUR 2,950.00 to the Claimant, being the difference between the costs advanced by him and the arbitration costs fixed by the BAT President.

7. AWARD

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

1. **Besiktas Jimnastik Kulubu shall pay Mr. Fedor Likholitov as follows a total amount of USD 140,000.00 as compensation for unpaid salary payments:**

   - **USD 35,000.00 plus interest at 5% per annum on such amount from 1 March 2011 onwards.**
   - **USD 35,000.00 plus interest at 5% per annum on such amount from 29 March 2011 onwards.**
   - **USD 35,000.00 plus interest at 5% per annum on such amount from 29 April 2011 onwards.**
   - **USD 35,000.00 plus interest at 5% per annum on such amount from 29 May 2011 onwards.**

2. **Besiktas Jimnastik Kulubu shall pay Mr. Fedor Likholitov USD 10,400.00 as compensation for rent liabilities together with interest at 5% per annum on such amount from 29 May 2011 onwards.**

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

Geneva, seat of the arbitration, 9 December 2011.

Klaus Reichert SC
(Arbitrator)