



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0201/11)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert SC

in the arbitration proceedings between

Mr. Shawn Taggart

Represented by Mr. Happy Walters
Rogue Sports, 1620 26th Street, Suite 1060N Santa Monica, CA 90404, USA

- Claimant -

vs.

DNEPR (Dnipro) Basketball Club
Lenin Street 33 Dnepropetrovsk, 49000 Ukraine

- Respondent -

1. The Parties

1.1 The Claimant

1. Mr. Shawn Taggart (hereinafter also referred to as “the Player”) is an American professional basketball player, who was retained by the Respondent, DNEPR (Dnipro) Basketball Club for the 2010-2011 season.

1.2 The Respondent

2. DNEPR (Dnipro) Basketball Club (hereinafter also referred to as “the Club”) is a professional basketball club competing in the Ukrainian professional basketball league.

2. The Arbitrator

3. On 5 August 2011, Prof. Richard H. McLaren, 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 Background and the Dispute

4. On 9 September 2010, the Player and the Club entered into an agreement whereby the latter engaged the Player for the 2010-2011 season (the “Agreement”).
5. Upon signing the Agreement, the Player was represented by an agent, Mr. Happy Walters.

6. Article 1 of the Agreement provides that its term shall run from 10 September 2010 to the end of the basketball season of 2010-2011 with the Player's obligations ceasing five business days after the Club's last official game.
7. Article 2 of the Agreement provides for the payments to be made by the Club to the Player. The agreed total amount of salary is set at USD 180,000.00, net of taxes, divided into nine instalments of USD 20,000.00. The first instalment is triggered "After Medical Exam (72 hours after arrival)" and thereafter on the 15th day of each month from October 2010 to May 2011 inclusive. The possibility of bonus payments are also found in Article 2 of the Agreement in the event of certain prescribed successes.
8. Article 2 also provides for the situation of late payments by the Club. If a payment were not to be made within fifteen business days of the scheduled payment date, the Player did not have to perform any of his services until all money and "appropriate interest penalties have been paid".
9. Article 3 of the Agreement provides for amenities (amongst others, an apartment, a car, two economy class round trip air tickets to the US, and medical coverage) to be paid for by the Club.
10. Article 4 of the Agreement provides for an obligation on the part of the Club to pay commission to the Player's "agents, *Happy Walters (Rogue Sports)* in the amount equal to 10% of the net Compensation described in Paragraph 2". The date for payment is set at 15 October 2010. Also, any delay in payment of that sum triggers interest "in the amount of an additional 10% penalty per month".
11. Article 8 of the Agreement provides for validity:

"VALIDITY: This agreement will be effective if: The Player passes the medical examination (the Club Physical)."

12. Following signature by the Club to the Agreement, arrangements were made for the Player to meet his new team in France. The Player flew to France arriving in Paris on 9 September 2010.

13. On 10 September 2010, Mr Happy Walters emailed “Elena” (Ms. Elena Zagaruiko - on behalf of the Club) in the following terms:

“Elena

Taggart tells me that the team wants him to play in a game today, but has not given him a physical medical exam yet. If he plays, and should he get hurt – pls confirm that the contract is valid and he will be deemed to have passed his physical.

Thanks

Happy”.

14. The response from Ms Zagaruiko on the same day is short and unequivocal:

“Happy!

our doctors checked him.

if he agrees please, let him play.”

15. Nine days later, on 19 September 2010, Mr Happy Walters emailed Ms Zagaruiko relaying the news he had received from the Player that the Coach of the Club wanted to send him home. The subsequent emails from the Club show that the Coach was of the view that the Player was not of the calibre he was looking for. On 12 October 2010 the Club’s email says:

“1. Per the contract the player should pass the medical and physical exam. He wanted to participate in games in Paris, the coach agreed to see his physical conditions and the player didn’t pass the test. His physical abilities were not of required level. That is why the coach released him with explanation of this situation.”

16. This position is repeated by the Club in its Answer dated 30 August 2011:

"We have received the request for Arbitration. In the documents attached we can see that the player was allowed to play by his agent not after med.examination, but when the player wanted to play. Yes, our doctors checked him. But there was no possibility to make the med.exam in a hospital as usual, because the team was not in Ukraine. As you can see the player didn't receive (as well as the agent) the written confirmation that the med.exam was passed, with the signature of doctors and the stamp of hospital. Also, when the player wanted to play, our coach gave him this possibility to see his physical abilities. and as you can see from the letters given by the claimer, he didn't pass the test." (sic)

17. In its second submission, the Club elaborates upon this point:

"As the Contract says, after arriving the Player must take the physical exam and after that he is allowed to play and to participate in Club's activity. (#8 of the Contract)

In letter dated 10.09.2010 the main idea is that the doctors checked the Player. But there are no any confirmations about his physical condition and that the test is passed, which the Agent of Player tries to acknowledge.

As the Team was not at those moment in Ukraine, the Player could not pass the total examination, which usually is held for all players of the Club. Without full medical examination, with a lot of analyses and indicators, none of the players is allowed to take part in the game or practice. Except the cases, when the Player asks the Coach to let him play before the total examination is passed.

Mr. Taggart wished to play and to take part in Club's activity. Our Coaches gave the player this possibility, in this way to show his abilities as the professional player.

The Contract clearly says that the Player is high level professional basketball player ("Recitals" in a Contract), but without seeing him on the court nobody can know whether it's true or not." (sic)

18. The Club also says, in its second submission, that:

"... the Player didn't show the high level skills as stated in Contract."

19. The Player's position is that he was given a medical; he was cleared to play; and subsequently played for the Club. The obligations of the Club were engaged.
20. The Player later played for UCAM Murcia that same season and earned USD 15,265.00.

3.2 The Proceedings before the BAT

21. The Player filed a Request for Arbitration dated 5 July 2011 in accordance with the BAT Rules and duly paid the non-reimbursable handling fee in the amount of EUR 2,947.59.
22. On 9 August 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:

<i>“Claimant (M. Shawn Taggart)</i>	<i>EUR 4,000</i>
<i>Respondent (DNEPR BC)</i>	<i>EUR 4,000”</i>

The foregoing sums were paid by or on behalf of the Player on 16 September 2011 (EUR 4,000.00), 7 October 2011 (EUR 1,093.68), 11 October 2011 (EUR 2,760.10) and 17 October 2011 (EUR 136.22). The Club did not pay its share of the advance on costs.

23. On 30 August 2011, the Club submitted its Answer to the Request for Arbitration.
24. By procedural order of 18 October 2011, the BAT informed the Parties that a second exchange of briefs was required.
25. On 27 October 2011, the Player filed his comments on the Answer of the Club.
26. On 8 November 2011, the Club filed its reply to the Player’s comments.
27. On 8 November 2011, the Parties were invited to submit their statements of costs and were notified that the exchange of documentation was closed.
28. On 21 November 2011 the Player set out his statement of costs.

29. On 30 November 2011 the Club stated the following:

“The Club had paid all expenses for transfers and lodging of the Player, while the Team was in France. The Club had informed beforehand the Player and the Agent that the Player was allowed to go to USA. The Club provided the Player with the ticket, paid all expenses for lodging and meals before the Player should leave. The Player received 500,00 Euros from the Club.

The copies of checks for the tickets are in attachment.”

30. On 29 December 2011, the Player was asked, for clarification purposes, by the Arbitrator, to state what salary he earned during the 2010-2011 season when playing for UCAM Murcia in Spain. This was answered by the Player on 4 January 2012 and the Club was afforded an opportunity to comment, of which it did not avail itself by the time permitted.

4. The Positions of the Parties

4.1 The Claimant's Position

31. The Player submits the following in substance: he signed the Agreement with the Club, was subjected to an examination by the Club and this triggered the responsibility of the Club. If the Club decided to dispense with his services thereafter, that did not absolve it of its responsibilities under the Agreement.

32. In his second submission, the Player requested the following relief: 1. USD 180,000; 2. USD 18,000 for Agent's commission; 3. USD 724.18 for a flight ticket; 4. USD 750 for hotel costs; 5. Reimbursement for the full FIBA filing fee; 6. Reasonable reimbursement for the cost of an apartment, the use of an automobile and sundry other amenities to which he was entitled under the Agreement. The Request for Arbitration sought interest as well as the amounts of salaries and agent's commission to be paid net of taxes.

4.2 Respondent's Position

33. The Club's position, in substance, is that a full medical examination did not take place and that particular threshold moment for the purpose of triggering the Agreement did not take place. The examination which did occur was not a full one and the Player asked to participate to show his skills.

5. The Jurisdiction of the BAT

34. 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).

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

36. 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.

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

"Any dispute arising from or related to the present Agreement 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 official language of this Agreement and the language the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono."

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

38. The Agreement is in written form and thus the arbitration agreement fulfills the formal requirements of Article 178(1) PILA.
39. 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).
40. 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 Agreement ..." clearly covers the present dispute. In addition, the jurisdiction of BAT has not been disputed by the Club.
41. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Player's claim.

6. Discussion

6.1 Applicable Law – ex aequo et bono

42. 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".

43. 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."

44. As seen above the Agreement clearly stipulates that: “[t]he arbitrator shall decide the dispute ex aequo et bono”.

45. 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

46. 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.”

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

6.2 Findings

48. The core issue which determines this dispute is whether the examination to which the Player was subjected triggers the compensation provisions of the Agreement. The contemporaneous evidence which was put before the Arbitrator is striking in this regard as it is an exchange between the Club and the Player’s Agent:

“Elena

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).

Taggart tells me that the team wants him to play in a game today, but has not given him a physical medical exam yet. If he plays, and should he get hurt – pls confirm that the contract is valid and he will be deemed to have passed his physical.

Thanks

Happy”.

The response from “Elena” is short and unequivocal:

“Happy!

our doctors checked him.

if he agrees please, let him play.”

49. At no stage in the course of the arbitration did the Club call into question the authority or position of Ms. Zagaruiko.
50. The Club suggests that the Player wanted to play and this brought about the perfunctory examination (which was not the same as a full examination in the hospital).
51. The Arbitrator finds that the Club’s position is not supported by the contemporaneous exchanges of emails (as above) or the terms of the Agreement. The Club plainly wanted the Player to play but had not yet performed the examination. The Agent took the appropriate step in ensuring that the examination took place before allowing his client to play. This was unequivocally confirmed by Ms. Zagaruiko on behalf of the Club and the expression “our doctors checked him” could not support any other meaning.
52. The Club’s position is also not supported by the terms of the Agreement. Nowhere in the Agreement does one find any specific provision for the extent or scope of the medical examination. No reference is made to an examination taking place in a hospital. Indeed the Agreement (Article 7) is clear that it contains the entire understanding between the Parties. With such a provision in place between the Parties, it is, as a matter of interpretation, simply impossible to find support for the Club’s

position in the Agreement.

53. The Arbitrator finds, therefore, that the Player's position must be preferred. The Club examined the Player; unequivocally told the Player's Agent in like terms; and then asked that he start playing. The fact that the Club, at a later date, no longer wished to avail of the Player's services cannot absolve it of its responsibilities under the Agreement.
54. The Arbitrator finds that the Club must pay the Player the salary which it contractually bound itself to pay. The Arbitrator also takes note of the fact that the Player earned sums in Spain in that same season as a professional basketball player and, consistent with BAT jurisprudence, the Player's claim will be reduced accordingly. The calculation is as follows: USD 180,000 (as per the Agreement) less USD 15,265 (the salary received in Spain) results in a net figure of USD 164,735.
55. In relation to the claim for the agent's commission, the Arbitrator finds that the Player is not entitled to recover such amount. As mentioned above (see para. 10) the Club undertook to pay a commission to the agent, Mr. Happy Walters. However, Mr. Walters is not a claimant in this arbitration. The Arbitrator finds that the Player has not substantiated on what grounds he (rather than Mr. Walters) is entitled to claim agent's commission and therefore his claim must, in that respect, fail.⁵
56. In relation to the claims for an apartment, automobile and the like, the Arbitrator does not find that these are sustained. The Player has not presented proof of the sums involved or what he paid elsewhere (for example in Spain) during the rest of the season. These claims are dismissed.

⁵ See also FAT 0008/08 Djoric v/ PBC Lukoil Academic; FAT 0008/08 Djoric v/ PBC Lukoil Academic; BAT 0129/10 Pomare v/ Gaz Metan Medias.

57. In relation to the claims for an air ticket and hotel costs, the Arbitrator notes from the emails attached to the Request for Arbitration that the Club said on 12 October 2010 that the player was given EUR 500 which is more than the USD 750 for the air ticket. The Player has not disputed this. The Player has also not provided proof of the hotel costs. Thus, the Arbitrator dismisses the claims for an air ticket and hotel costs.
58. The Player is also requesting the payment of interest on the sums owed at an annual rate of 5%.
59. 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. It is normal and fair that interest is due on the late payments. An interest rate of 5%, which in this case seems fair and reasonable and is in line with BAT jurisprudence, will be awarded.
60. It is an established principle that interest runs from the day after the date on which the principal amounts are due. The question for the Arbitrator to determine is what day is the appropriate day or days for interest to start running. At the very latest it appears to the Arbitrator that on 12 October 2010 the Club made it clear that it was not going to retain the Player. Prior to that time there was back and forth and on 8 October 2010 the Player's Agent even stated that his client was "willing to listen to an offer". The Player's Agent also, on that day, made it clear that FIBA arbitration was potentially involved. Notwithstanding that threat, on 12 October 2010 the Club made it clear that it was not going to adhere to the Agreement. In such circumstances, and in light of fairness and equity, the Arbitrator holds that the appropriate moment from which interest should run is 13 October 2010 on the entire sum which is due to the Player (namely USD 164,735).

7. Costs

61. 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.
62. On 6 February 2012 - 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 5,150.00.
63. Considering, that the Claimant prevailed in the main part of his claim, it is fair that the fees and costs of the arbitration be borne by the Club and that it be required to cover its own legal fees and expenses as well as those of the Claimant.
64. Given that the Claimant paid advances on costs of EUR 7,990.00 as well as a non-reimbursable handling fee of EUR 2,947.59 (which will be taken into account when determining the Claimant’s legal fees and expenses), the Arbitrator decides that in application of article 17.3 of the BAT Rules:
- (i) BAT shall reimburse EUR 2,840.00 to the Claimant, being the difference between the costs advanced by the Player and the arbitration costs fixed by the BAT President;



BASKETBALL
ARBITRAL TRIBUNAL

- (ii) The Club shall pay EUR 5,150.00 to the Claimant, being the difference between the costs advanced by him and the amount he is going to receive in reimbursement from the BAT;
- (iii) The Club shall pay to the Claimant EUR 2,947.59 (for the non-reimbursable fee) representing the amount of his legal fees and other expenses.

8. AWARD

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

- 1. DNEPR (Dnipro) Basketball Club shall pay Mr. Shawn Taggart a total amount of USD 164,735, net of taxes, as compensation for unpaid salary payments plus interest at 5% per annum on such amount from 13 October 2010 onwards.**
- 2. DNEPR (Dnipro) Basketball Club shall pay Mr. Shawn Taggart an amount of EUR 5,150.00 as reimbursement for his arbitration costs.**
- 3. DNEPR (Dnipro) Basketball Club shall pay Mr. Shawn Taggart an amount of EUR 2,947.59 as reimbursement for his legal fees and expenses.**
- 4. Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 10 February 2012

Klaus Reichert SC
(Arbitrator)