



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0258/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Entersport

128 Heather Dr., New Canaan, CT 06840, USA

- Claimant -

represented by Mr. Reed Nopponen, Senior Vice President,
Entersport, 128 Heather Dr., New Canaan, CT 06840, USA

vs.

Men's Basketball Club Dynamo Moscow

Ul. Ostrovnaya 7, Moscow 121552, Russia

- Respondent -

1. The Parties

1.1 The Claimant

1. Entersport (hereinafter also referred to as the “Agency”) is an agency representing professional basketball players. It is located in New Canaan, CT, USA. Mr. Reed Nopponen is Entersport’s senior vice president. Although the Request for Arbitration names both Entersport and Mr. Nopponen as claimants, the Arbitrator finds based on the Parties’ submissions that Entersport is actually to be considered as the only claimant whereas Mr. Nopponen acts as the person representing Entersport in this arbitration.

1.2 The Respondent

2. Men’s Basketball Club Dynamo Moscow or MBC Dynamo Moscow (hereinafter the “Club”) is a professional basketball club located in Moscow, Russia. The Club is not represented in this arbitration.

2. The Arbitrator

3. On 13 March 2012, the President of the Basketball Arbitral Tribunal (hereinafter the “BAT”), Prof. Richard H. McLaren, 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”). None 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 September 2008, the parties entered into two agreements through which the Agency undertook to assist the Club in hiring the coach Mr. David Blatt (the “Blatt Agreement”) and the player Mr. Yaroslav Korolev (the “Korolev Agreement”) for the 2008-2009 season (collectively the “Agency Agreements”) and to “*provide services connected with completing Men’s basketball team of the Club in the season 2008-2009*” (Clause 1.1 of the Agency Agreements).

5. The Agency Agreements provide for compensation for the Agency’s services payable after the end of the 2008-2009 season (the “Agent Fees”). The Agent Fee for the services relating to the coach Mr. Blatt, amounts to EUR 150,000.00 net of Russian taxes, payable to the Agency according to Clause 3 of the Blatt Agreement as follows:

*"- by 30 September 2009 – 15 000 (fifteen thousand) Euro
- by 30 October 2009 – 15 000 (fifteen thousand) Euro
- by 30 November 2009 – 30 000 (thirty thousand) Euro
- by 30 December 2009 – 30 000 (thirty thousand) Euro
- by 30 January 2010 – 30 000 (thirty thousand) Euro
- by 28 February 2010 – 30 000 (thirty thousand) Euro"*

6. Clause 3 of the Korolev Agreement provides that the Agent Fee for the services relating to the player Mr. Korolev is EUR 35,000.00 and payable to the Agency as follows:

*"- until August 30, 2009 – 15 000 (Fifteen thousand) Euro
- until September 30, 2009 – 20 000 (Twenty thousand) Euro"*

7. On 10 August 2009, the Parties signed two further agreements regarding the “termination” of the Agency Agreements (the “Termination Agreements”). The

Termination Agreements confirm that the Agency had fulfilled its obligations under the Agency Agreements and that the Agent Fees agreed in the Agency Agreements were now due for payment to the Agency.

8. To date, the Club has paid to the Agency EUR 10,000.00 of the EUR 150,000.00 under the Blatt Agreement and EUR 5,000.00 of the EUR 35,000.00 due in accordance with the Korolev Agreement. The remaining amounts of EUR 140,000.00 (Blatt) and EUR 30,000.00 (Korolev) are still outstanding and are the subject matter of these proceedings.

3.2 The Proceedings before the BAT

9. On 17 February 2012, the BAT Secretariat received the Agency's Request for Arbitration of the same day and several exhibits. The non-reimbursable handling fee of EUR 3,000.00 was received in the BAT bank account on 17 February 2012.
10. By letter of 19 March 2012, the BAT Secretariat confirmed receipt of the Request for Arbitration and informed the Parties about the appointment of the Arbitrator. Furthermore, a time limit was fixed for the Club to file its answer to the Request for Arbitration in accordance with Article 11.2 of the BAT Rules (hereinafter the "Answer") by no later than 9 April 2012. The BAT Secretariat also requested the Parties pay the following amount as an Advance on Costs by no later than 29 March 2012:

<i>"Claimant (Entersport)</i>	<i>EUR 4,000</i>
<i>Respondent (MBC Dynamo Moscow)</i>	<i>EUR 4,000"</i>

11. By letter of 12 April 2012, the BAT Secretariat informed the Parties that the Club had failed to submit its answer. Furthermore, both Parties had failed to pay their share of the Advance on Costs. The Parties were requested to effect payment in order to ensure that the proceedings continue by no later than 23 April 2012.

12. By letter of 20 April 2012, the BAT Secretariat informed the Parties that it had received the full amount of the Advance on Costs paid in full by the Agency and further that the Club still had failed to submit its answer despite being duly notified of the proceedings. The Club was therefore granted a final opportunity to file an answer by no later than 30 April 2012.
13. By letter of 10 May 2012, the BAT Secretariat stated that it had not received an answer to the Request for Arbitration and that the Arbitrator had decided to declare the exchange of documents complete. The Parties were therefore invited to submit a detailed account of their costs until 21 May 2012.
14. On 17 May 2012 the Agency submitted an account of costs as follows:

"Claimant 3.000 EUR BAT handling fee (paid February 17, 2012) 4.000 EUR Entersport's share of the "advance on costs" (paid April 12, 2012) 4.000 EUR MBC Dynamo Moscow's share of the "advance on costs" which was paid by Entersport since Dynamo Moscow failed to pay said share (paid April 12, 2012)

Total: 11.000 EUR"
15. The Club did not submit any account of costs.
16. By letter of 22 May 2012, the BAT Secretariat acknowledged receipt of the Agency's account of costs and invited the Club to submit it comments, if any, on the Agency's account of costs by no later than 25 May 2012. The Club did not file any comments.

4. The Positions of the Parties

4.1 The Claimant's Position

17. The Agency submits the following in substance:
 - The Parties signed two Agency Agreements relating to the engagement of the

coach, Mr. David Blatt and the player, Mr. Yaroslav Korolev for the season 2008-2009.

- On 10 August 2009, i.e. after the 2008-2009 season, the Parties signed two Termination Agreements by which they confirmed that both Agency Agreements had been fulfilled and that the Agent Fees were due.
- The Agency received three payments, namely two payments of EUR 5,000.00 each related to the Blatt Agreement (23 July 2010 and 2 August 2010) and one payment of EUR 5,000.00 in accordance with the Korolev Agreement (15 September 2009). The remaining amount of EUR 170,000.00 is still outstanding as of today.
- The Agency submitted a number of e-mails between the Parties regarding the payments that were due and owing. According to these e-mails, the Club repeatedly acknowledged its debt and confirmed that all amounts due would be paid in full as soon as possible. The Club's only excuse was its own difficult financial situation "which is not subject to any control".

4.2 The Claimant's Request for Relief

18. In its Request for Arbitration, the Agency requests the following relief:

"Past due agent fees in the amount of 170,000.00 EUR (one hundred seventy thousand Euros) plus interest from due dates plus costs of this arbitration."

4.3 The Respondent's Position and Request for Relief

19. Despite several invitations by the BAT, the Club neither engaged in the arbitration proceedings at hand, nor did it make any submissions within the time limits set by the Arbitrator in accordance with the BAT Rules.

5. The Jurisdiction of the BAT

20. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Club did not participate in the arbitration, he will examine his jurisdiction *ex officio*, on the basis of the record as it stands.
21. 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).
22. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
23. 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.
24. The jurisdiction of the BAT over the dispute results from the arbitration clauses contained in Article 5.1 of the two Agency Agreements, which are identical and read as follows:

“5.1 In case of disputes on the present Agreement the parties will take all measures to solve them by negotiations. If the dispute between the parties is not resolved by way of negotiations then it should be resolved in accordance with the FIBA Arbitral Tribunal (FAT) as follows: 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. Awards of the FAT 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 FAT and against decisions of the Court of Arbitration for Sport (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.

9.3 FAT shall apply the laws of Switzerland in deciding the dispute between Club and Executor.”

25. In accordance with Article 1.1 of the BAT Rules, these rules “*shall apply whenever the parties to a dispute have agreed in writing to submit the same to the BAT – including by reference to its former name “FIBA Arbitral Tribunal (FAT)”*” (emphasis in the original). Furthermore, Article 18.2 of the BAT Rules says: “*Any reference to BAT’s former name “FIBA Arbitral Tribunal (FAT)” shall be understood as referring to the BAT.*” The Parties’ reference to the “FIBA Arbitral Tribunal (FAT)” in Clause 5.1 of the Agency Agreement is therefore understood as a reference to the BAT.
26. The Agency Agreements are in written form and thus the arbitration agreements fulfil the formal requirements of Article 178(1) PILA.
27. The two Termination Agreements do not contain a specific arbitration clause. However, the Arbitrator finds that the Termination Agreements are not separate undertakings but rather confirmations by the Parties that the Agency had fulfilled its obligations under the Agency Agreements and that the payments due to the Agency would be paid on the dates stipulated in the Agency Agreements. As a consequence, the Termination Agreements are not autonomous agreements, but rather amendments to the otherwise applicable Agency Agreements which were not replaced by the Termination Agreements but remained in full force and effect. Accordingly, the arbitration agreements contained in the Agency Agreements apply equally to claims based only on the Termination Agreements.
28. The Arbitrator also considers that there is no other indication in the file which could cast doubt on the validity of the arbitration agreements under Swiss law (referred to by Article 178(2) PILA). In particular, the wording “[a]ny dispute arising from or related to the present contract” in Article 5.1 of the Agency Agreements covers the present dispute.

29. For the above reasons, the Arbitrator finds that he has jurisdiction to adjudicate the Agency's claims.

6. Other Procedural Issues

6.1 Respondent's failure to submit an Answer

30. Article 14.2 of the BAT Rules, which the Parties have declared to be applicable in the arbitration agreements, specifies that "*the Arbitrator may nevertheless proceed with the arbitration and deliver an award*" if "*the Respondent fails to submit an Answer.*" The Arbitrator's authority to proceed with the arbitration in case of default by one of the parties is in accordance with Swiss arbitration law and the practice of the BAT¹. However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.
31. This requirement is met in the current case. The Club was informed of the initiation of the proceedings and of the appointment of the Arbitrator according to the relevant rules. It was also given opportunity to respond to the Agency's Request for Arbitration and to the Agency's account on costs. Still, the Club has chosen not to respond within the time limits set by the Arbitrator according to the BAT Rules.

7. Applicable Law – *ex aequo et bono*

32. 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

¹ See *ex multis* BAT cases 0001/07, *Ostojic and Raznatovic vs. PAOK KAE*; 0018/08, *Nicevic vs. Beşiktaş*; 0093/09, *A.S.D. Pallacanestro Femminile Schio vs. Braxton*; 0170/11, *Haritopoulos and Kallergis vs. Panionios BC K.A.E. and Gallis*.

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”.

33. 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.”

34. In the arbitration agreements in Clause 5.1 of the Agency Agreements, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono*. (see para. 24 above)

35. However, the last sentence of Clause 5.1 of the Agency Agreements also refers to Swiss law:

“9.3 FAT shall apply the laws of Switzerland in deciding the dispute between Club and Executor.”

36. This sentence is obviously contradicting to the second last sentence of Article 5.1 of the Agency Agreements, which empowers the Arbitrator to decide a dispute *ex aequo et bono*. The Arbitrator finds that the last sentence has most likely been the result of a copy/paste-error and not the result of a discussion on the applicable law between the Parties. Such understanding is, in particular, indicated by the numbering “9.3” as part of Clause 5 while the Agency Agreements end with Clause 8. Furthermore, there is no indication on record that this point was discussed at all, and neither Party requested the Arbitrator that Swiss law should be taken into account when deciding this dispute.

37. Consequently, the Arbitrator will decide the issues submitted to him in this proceeding *ex aequo et bono*.

38. The concept of “*équité*” (or *ex aequo et bono*) used in Article 187(2) PILA has been 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.*”

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

8. Findings

40. The Agency requests the outstanding Agent Fees in the total amount of EUR 170,000.00 net of Russian taxes.

41. According to the Agency Agreements and the Termination Agreements, the Agency was entitled to Agent Fees related to its services concerning Mr. Blatt and Mr. Korolev in the amount of EUR 185,000.00. Only EUR 15,000.00 has been paid.

42. There is no document on record that would indicate that the Club ever disputed the quantum of the claimed Agent Fees or that the Agency did not perform its services. To the contrary: the Club signed the Termination Agreements where Clause 1 explicitly confirms that the Agency fulfilled its obligations. The Club repeatedly acknowledged its debts and promised payment: in the Club’s emails of 3 March, 21 May and 22 October 2009 the Club confirmed that all amounts due would be paid in full as soon as possible. In addition, by email of 27 May 2010 the Club’s General Director, Mr. Gennady Drozdov, wrote to Mr. Nopponen as follows:

*“Dear Reed,
I apologise for such a long delay in payment of your agent fees for Blatt, but we have a very difficult financial situation which is not subject to any control. The season is coming [...] and we will start paying you. I want to tell you that we do not refuse our debt to you and accept it. All we owe you will be paid to you fully. Very soon you will receive the first payment.
Regards,
Gennady Drozdov”*

43. The alleged economic difficulties are certainly regrettable but they do not release the Club from its contractual obligations. The Arbitrator finds therefore that the Agency is entitled to the outstanding Agent Fees in the total amount of EUR 170,000.00 net of Russian taxes.

9. Interest

44. The Agency requests “interest” – without any indication of the applicable rate – “from due dates”.

45. Neither the Agency Agreements nor the Termination Agreements provide for the payment of default interest. Furthermore, in the parties’ email correspondence between 3 March 2009 and 29 August 2011 about the due payments, no interest was claimed by the Agency.

46. According to BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest.² This is a generally accepted principle which is embodied in most legal systems. However, it is also generally accepted that the obligee has to request payment of interest from the obligor. The Agency has claimed interest only in its Request for Arbitration.

47. The Arbitrator, deciding *ex aequo et bono* and taking into consideration that the Agency has not claimed interest in its correspondence with the Club, finds that the starting date for the calculation of the default interest shall be the day of the Request of Arbitration which is 17 February 2012.

² See, *ex multis*, the following BAT awards: 0092/10, *Ronci, Coelho vs. WBC Mizo Pecs 2010*; 0069/09, *Ivezic, Draskicevic vs. Basketball Club Pecs Noi Kosariabda Kft*; 0056/09, *Branzova vs. Basketball Club Nadezhda*.

48. Regarding the interest rate, still deciding *ex aequo et bono* and in line with BAT jurisprudence, the Arbitrator considers interest in the rate of 5% p.a. to be fair and equitable in the present case.

10. Costs

49. 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.

50. On 19 June 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 6,200.00.

51. Considering the outcome and the circumstances of the present case, the Arbitrator finds it fair that the fees and costs of the arbitration shall be borne by the Club alone.

52. Given that the Agency paid the totality of the Advance on the arbitration costs of EUR 8,000.00, the Arbitrator decides that:

(i) the BAT shall reimburse EUR 1,800.00 to the Agency;

(ii) the Club shall pay to the Agency the difference between the costs

advanced by the Agency and the amount which is going to be reimbursed to it by the BAT, i.e. EUR 6,200.00.

53. Furthermore, the Arbitrator considers it adequate that the Agency is entitled to a contribution towards its legal fees and other expenses (Article 17.3. of the BAT Rules). Considering the Agency's account of costs which indicates no other legal costs than the payment of the non-reimbursable handling fee of EUR 3,000.00, the Arbitrator deems it appropriate to take into account such amount when assessing the expenses incurred by the Agency in connection with these proceedings and to hold that the Club shall reimburse the amount of EUR 3,000.00 to the Agency.

11. AWARD

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

- 1. MBC Dynamo Moscow is ordered to pay to Entersport the amount of EUR 170,000.00 net plus interest of 5% p.a. since 17 February 2012.**
- 2. MBC Dynamo Moscow is ordered to pay to Entersport the amount of EUR 6,200.00 as a reimbursement of its advance on arbitration costs.**
- 3. MBC Dynamo Moscow is ordered to pay to Entersport the amount of EUR 3,000.00 as a contribution towards its legal fees and expenses.**
- 4. Any other or further-reaching prayers for relief are dismissed.**

Geneva, seat of the arbitration, 25 June 2012

Stephan Netzle
(Arbitrator)