ARBITRAL AWARD

(BAT 0263/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert SC

in the arbitration proceedings between

Ms. Marta Jujka

- Claimant 1 -

TP Sports Ltd
Vitebsky prospect 79/3-37, 196233 St. Petersburg, Russia

- Claimant 2 -

represented by

Mr. Victor Berezov

vs.

Miejski Miedzyszkolny Klub Sportowy Katarzynki Torun "Energa"
35/2 Matejki, 87-100 Torun, Poland

- Respondent -

1. The Parties

1.1 The Claimants

1. Ms. Marta Jujka (hereinafter referred to as “Claimant) is a professional basketball player, who was retained by the Respondent, Miejski Miedzyszkolny Klub Sportowy Katarzynki Torun “Energa” for the 2011-2012 season.

2. TP Sports Ltd is a basketball agency which represented the Claimant leading to the latter’s retainer by the Respondent. Initially in this arbitration TP Sports Ltd advanced a claim against the Respondent but on 2 April 2012 (by email of that date) the BAT was formally notified that same was withdrawn as having been satisfied by the Respondent.

1.2 The Respondent

3. Miejski Miedzyszkolny Klub Sportowy Katarzynki Torun “Energa” (hereinafter referred to as “Respondent”) is a professional basketball club in Torun, Poland.

2. The Arbitrator

4. On 16 March 2012, 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"). 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 Background and the Dispute

5. On 1 July 2011, the Claimant and the Respondent entered into an agreement whereby the latter engaged the former to play basketball for the 2011-2012 season ("the Agreement"). The Claimant's salary was agreed at PLN 140,000.00 plus VAT (23%), payable in ten equal monthly instalments from 30 August 2011.

6. The Claimant was paid, in total, PLN 26,000.00 by the Respondent. The Claimant terminated the Agreement by letter dated 1 February 2012 and demanded payment in full of the then outstanding amounts. The fact that the Respondent has not made all the payments to the Claimant is what has triggered the Claimants' Request for Arbitration.

3.2 The Proceedings before the BAT

7. The Claimants filed a Request for Arbitration dated 29 February 2012 in accordance with the BAT Rues.

8. The non-reimbursable handling fee in the amount of EUR 2,000.00 was paid on 1 March 2012.

9. On 20 March 2012, the BAT informed the Parties that Mr. Klaus Reichert SC had been appointed as the Arbitrator in this matter. Further, the BAT fixed the advance on costs to be paid by the Parties as follows:

"Claimant 1 (Ms. Marta Jujka)	*EUR 3,000*
Claimant 2 (TP Sports)	*EUR 500*
Respondent (MMKS Katarzynki Torun "Energa")	*EUR 3,500"*

The foregoing sums were paid as follows: 27 March 2012, EUR 3,000.00 (Claimant's share) paid by Claimant; and 8 May 2012, EUR 3,000.00 (Respondent's share) paid by the Claimant. It is noted at this juncture in the Award that the Respondent's failure to pay its share of the advance on costs led to the Counterclaim which it advanced in this arbitration being deemed to have been withdrawn, applying Article 9.3 of the BAT Rules mutatis mutandis. This fact was confirmed by the Arbitrator on 26 April 2012.

10. On 9 April 2012, the Respondent delivered its Answer and also asserted a counterclaim against the Claimant.

11. On 11 May 2012, the Claimant requested additional relief arising from the Respondent's team success in the Polish Women's Basketball League and bonus provisions under the Agreement.

12. On 24 May 2012, the Claimant filed her second round of arguments and accompanying exhibits (the Arbitrator having directed such second round).

13. On 13 June 2012, the Respondent filed its second round of arguments.

14. On 26 June 2012, the Parties were invited to submit their statements of costs and were notified that the exchange of documentation was closed in accordance with Article 12.1 of the BAT Rules. Both Parties submitted statements of costs and were afforded an opportunity to comment.

4. The Positions of the Parties

15. The Claimant says that she was not paid in accordance with the agreed schedule in the Agreement and eventually terminated by reason of the non-payments. There is nothing more complicated in her position in this Arbitration than that and she says, as regards her additional claim for a bonus, that she should be entitled to this further item had the

Respondent not been in breach of its contractual obligations.

16. The Respondent's position is two-fold: firstly that the Claimant did not present invoices and therefore payment is not due, and that secondly, she hid an injury. This latter allegation was the foundation for the Respondent's counterclaim.

5. The Jurisdiction of the BAT

17. 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).

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

19. 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].

20. The jurisdiction of the BAT over the Claimant's claims results from the arbitration clause contained under "XII. - ARBITRATION" of the Agreement, which reads as follows (in relevant part):

> *"Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT 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, irrespective of the parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono."*

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

21. The Agreement is in written form and thus the arbitration clause fulfils the formal requirements of Article 178(1) PILA.

22. 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 clause under Swiss law (referred to by Article 178(2) PILA).

23. The jurisdiction of BAT over the Claimant's claims arises from the Agreement. The wording "*Any dispute arising from or related to the present contract* …" clearly covers the present dispute. Further the Arbitrator's jurisdiction has not been questioned or challenged in any respect by the Parties in any of their submissions.

24. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Claimant's claims.

6. Discussion

6.1 Applicable Law – ex aequo et bono

25. 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".*

26. 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."*

27. As stated above, the Agreement clearly stipulates that: "*[T]he arbitrator shall decide the dispute ex aequo et bono*".

28. 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]

29. 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*."

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

6.2 Findings

31. The doctrine of *pacta sunt servanda* (which is consistent with justice and equity – parties who make a bargain are expected to stick to that bargain) is the principle by which the Arbitrator will examine the positions of the parties.

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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 P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

4 JdT 1981 III, p. 93 (free translation).

32. It is plain to the Arbitrator that the Claimant entered into the Agreement with the Respondent in the full and legitimate expectation that the obligations owed to her by the Respondent would be duly performed. The Claimant was paid, in small part and late, for her services, but not in the full amounts agreed.

33. The Agreement (clause IV) is quite explicit in that the Respondent committed to paying the Claimant a specific series of salary payments and the language indicating that commitment is explicit by the use of the phrase "the Club will pay the Player". This leaves no room for doubt as to the agreed commitment to pay.

34. The parties' explicit agreement as regards the commitment by the Respondent to make the agreed payments finds its clearest expression in clause VII, namely the no-cut clause. This clause commences by stating that the Respondent agrees that the Agreement "will be honored" in full under all circumstances, including injury or illness. This is then made subject to certain exceptions, the most important of which is, in effect, the passing by the Claimant of a medical examination. This is a standard type of threshold leading to the effectiveness or otherwise of professional basketball contracts. The Agreement is particularly explicit (sub-clause A) which places the burden squarely upon the Respondent to identify anything wrong with the Claimant and, further, states that if the Respondent does not perform an examination within three days of the Claimant's arrival, the Claimant is deemed to have passed the medical examination.

35. In summary, once the Claimant passes, or is deemed to have passed a medical examination, all obligations to pay monies under the Agreement are triggered. The other exceptions noted in the Agreement are not of relevance.

36. The position of the Respondent in this Arbitration is, to the Arbitrator's mind, most relevant in determining whether the Claimant's claims are well-founded or not.

37. First, the Respondent says that the Claimant did not issue invoices and therefore it was

not possible for the monies to be paid. This is an unmeritorious argument and finds no support in the Agreement. The Agreement is very clear in that it creates specific obligations on specific dates throughout its agreed lifetime. There is no obligation on the part of the Claimant to issue invoices and indeed it would appear that such invoices would be superfluous to the already-incurred obligations. The monies were agreed to be owed and paid on particular dates, and it would be curious for the Respondent to await further invoices in respect thereof. The weakness of the argument made by the Respondent is demonstrated by the fact that there was no contemporaneous correspondence or complaint put before the Arbitrator by the Respondent that the fact that the Claimant had not issued an invoice was a bar to payment. It is rejected.

38. Secondly, the Respondent says that its position was justified as the Claimant had an injury which she hid. This is a very serious allegation and would require compelling proof that the Respondent had: (1) carried out a timely and thorough medical examination (consistent with best practice in the basketball industry) at which a series of specific questions had been put by the doctor or relevant practitioner; and (2) that the alleged injury complained of would not have been apparent to such a professional properly carrying out such an examination; and (3) answers given by the Claimant to the questions posed were knowingly incorrect and misleading.

39. This is a heavy burden for any club and rightly so. A professional basketball club makes a significant investment in its players and it is therefore incumbent on a club to thoroughly examine a potential player as it is very well known (and reflected in virtually every professional basketball contract) that once the medical is passed, contract sums are usually guaranteed. This is the well-established practice and no well-informed club could be in any doubt about it. In short, if a club does not perform a thorough enough medical examination, then it must bear the later consequences.

40. The Arbitrator has carefully and repeatedly reviewed the papers put before him by both Parties and it is manifestly clear that the Respondent does not satisfy the burden of

proving the necessary ingredients of its allegation that the Claimant hid an injury. The Respondent puts forward no argument or proof which could support, much less sustain an argument that the Claimant hid an injury. It appears from the Respondent's Answer that if there was an injury then this was not picked up in this examination (the procedure named was magnetic resonance) but that is not something to be laid at the Claimant's door.

41. As against this, the Claimant says that "[T]he injury which prevented the Claimant to train and play for the Club has been received by her during the training session in the Club and has not been linked with her previous injury and surgery operation."

42. It is also of relevance that the Respondent's counterclaim rested on its allegations of a hidden injury. However, as already noted above, the Respondent did not pay the Advance on Costs and therefore its counterclaim was deemed to have been withdrawn. This is a relevant evidential factor for the Arbitrator. The Respondent made a very serious allegation, saw fit in its pleadings to base a counterclaim on such allegation, but then failed to make the necessary payments in order to keep that counterclaim alive. Whilst not determinative of the issue as to whether the "hidden injury" is a good or bad defence point, the fact that the Respondent permitted the counterclaim to be abandoned or withdrawn is a factor which the Arbitrator considers to be supportive of his conclusion that the Respondent has not satisfied its evidential burden in proving this defence.

43. The Arbitrator therefore finds that the "hidden injury" defence must fail.

44. The Arbitrator holds that, in light of the clear and guaranteed sums which the Agreement obliged the Respondent to pay to the Claimant, it is clear that the Respondent did not abide by the bargain it struck with the Claimant. The Respondent was substantially in arrears with its payments to the Claimant and there is no valid excuse for its conduct in this regard. The Claimant was entirely within her rights to

terminate the Agreement.

45. Turning to the relief sought by the Claimant the Arbitrator examines each heading as follows:

(a) PLN 5,980.00 being the VAT (23%) on the PLN 26,000.00 already paid. This is well founded and the calculation is correct. The Agreement explicitly requires the Respondent to pay VAT to the Claimant.

(b) PLN 114,000.00 plus VAT (23%) of PLN 26,220.00 being the remaining salary payments under the Agreement. The Claimant states, and the Arbitrator accepts her position, that she was not able to mitigate her circumstances at the time of termination for the balance of the season[5]. The Claimant's claim therefore for the balance of the Agreement contract sum (PLN 140,000.00 minus PLN 26,000.00) plus VAT is correct and well founded.

(c) PLN 50,000.00 being the late payment penalty amount sought by the Claimant. The Agreement says that she is entitled to PLN 1,000.00 per week in respect of late payments. Her Request for Relief seeks PLN 50,000.00 however the table calculating the penalty amounts totals PLN 55,000.00. The calculation does stop the penalty calculation on the date of termination and does not seek such sums thereafter. The Arbitrator finds this to be an appropriate approach taken by the Claimant and consistent both with the Agreement and the justice of the case (particularly in light of the fact that the Claimant has not sought interest).

(d) PLN 13,641.50 being the amount of medical costs. The Arbitrator finds that the

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5 This fact is also confirmed by publicly available information, see http://www.eurobasket.com/player.asp?Cntry=POL&PlayerID=104473

Claimant has established her claim to this amount as the Agreement is explicit on the commitment by the Respondent to afford the Claimant medical services (Clause VI).

(e) PLN 4,000.00 plus VAT as a bonus by reason of the Respondent's team bronze medal success in the 2011-2012 season. The Arbitrator does not accept that the Claimant should be awarded this sum. She terminated on 1 February 2012 and by that stage it would not have been certain or likely to the point of certainty that the Respondent's team were going to achieve that success. The claim advanced by the Claimant in this regard is too remote and is rejected.

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 5 October 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 5,300.00.

48. Considering that the Claimant prevailed in almost all of her claims, it is fair that the fees and costs of the arbitration be borne by the Respondent and that it be required to cover its own legal fees and expenses as well as those of the Claimant.

49. The Claimant's claim for legal fees and expenses amounts to EUR 6,320.00 and this is reasonable and proportionate both by reference to the sums claimed, the sums awarded and the amount of documentation put before the Arbitrator. In addition the Arbitrator will award a figure reflecting the non-reimbursable handling fee of EUR 2,000.00, which is to be borne by the Respondent.

50. Given that the Claimant paid an advance on costs of EUR 6,000.00, as well as a non-reimbursable handling fee of EUR 2,000.00 (which, as noted above, is taken into account when determining the Claimant's legal expenses), the Arbitrator decides that in application of article 17.3 of the BAT Rules:

    (i) BAT shall reimburse EUR 700.00 to the Claimant, being the difference between the costs advanced by her and the arbitration costs fixed by the BAT President;

    (ii) The Respondent shall pay EUR 5,300.00 to the Claimant, being the difference between the costs advanced by her and the amount she is going to receive in reimbursement from the BAT;

    (iii) The Respondent shall pay to the Claimant EUR 8,320.00 representing the amount of her legal fees and expenses.

8. AWARD

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

1. **Miejski Miedzyszkolny Klub Sportowy Katarzynki Torun "Energa" shall pay Ms. Marta Jujka:**
    a. **PLN 5,980.00 for the VAT**
    b. **PLN 114,000.00 plus VAT (23%) of PLN 26,220.00 for salary**
    c. **PLN 50,000.00 for late payment penalties**
    d. **PLN 13,641.50 for medical costs**
2. **Miejski Miedzyszkolny Klub Sportowy Katarzynki Torun "Energa" shall pay Ms. Marta Jujka EUR 5,300.00 as reimbursement for her arbitration costs.**
3. **Miejski Miedzyszkolny Klub Sportowy Katarzynki Torun "Energa" shall pay Ms. Marta Jujka EUR 8,320.00 as reimbursement for her legal fees and expenses.**
4. **Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 11 October 2012

Klaus Reichert SC
(Arbitrator)