



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0264/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Quentin Byrne-Sutton

in the arbitration proceedings between

Mr. Szymon Szewczyk,

- Claimant 1 -

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

- Claimant 2 -

vs.

S.S. Felice Scandone S.p.A.,
c/o PalaDelMauro – c/da Zoccolari,
83100 Avellino (AV), Italy

- Respondent -

1. The Parties

1.1 The Claimants 1 and 2

1. Mr. Szymon Szewczyk is a Polish professional basketball player (hereinafter referred to as “the Player” or “Claimant 1”).
2. Entersport is the agency representing the Player (hereinafter “the Agent” or “Claimant 2”).
3. Claimants 1 and 2 are referred to jointly as “the Claimants”.

1.2 The Respondent

4. S.S. Felice Scandone S.p.A. (hereinafter also referred to as “the Club” or “the Respondent”) is an Italian professional basketball club.

2. The Arbitrator

5. On 27 March 2012, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (the “BAT”), appointed Mr. Quentin Byrne-Sutton 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

6. On 7 July 2011, the Claimants and the Club entered into a contract for the 2011-2012 season (the “Contract”), covering specified amounts of remuneration for the Player and

agency fees for the Agent.

7. On 1 October 2011, after the Claimants had put the Club on notice on 29 September 2011 that they were terminating the Contract due to various late payments, the Claimants and the Club entered into a "Settlement and Release Agreement" (the "Settlement Agreement"), whereby according to the preamble: "Club, Player and Agent shall terminate their Contract and thereby fully settle and mutually release each other from all of their obligations set forth in their Contract", under conditions stipulated thereafter in the Settlement Agreement.
8. Clauses 1 and 2 of the Settlement Agreement specify the amount of outstanding payments the Club must make to the Claimants within certain deadlines.
9. Clause 3 of the Settlement Agreement provides that: "*Club agrees that Player is free to play everywhere in the world for the 2011-12 season and beyond, and shall immediately cause the issuance of Player's Letter of Clearance as necessary*".
10. Clauses 4 and 7 of the Settlement Agreement stipulate that if the Club is more than 30 days late in paying any of the installments specified under clauses 1-2, the Player and the Agent shall be entitled to file a request for arbitration with the BAT and that in such case: "*Club shall be solely responsible for all of Player's and/or Agent's legal fees associated with said BAT proceeding*".
11. Clause 5 of the Settlement Agreement provides that:

"In addition, in the event Club does not make any scheduled payment listed herein on time to either the Player or Agent, Player and/or his Agent shall be entitled to their remedies as provided for in Paragraph 8 of the Contract without Club having the right of set off. Such remedies include, but are not limited to, the obligation of Club to pay Player all the payments of the 2011-12 season provided for in the Contract (that is, 300.000 EUR) and to pay Agent 30.000 EUR for the 2011-12 season. Club shall be solely responsible for all of Player's and/or Agent's legal fees associated with bringing a BAT proceeding in this respect."
12. Article 3 of the Contract provides that the Contract is a "... *no-cut guaranteed contract*." Article 3 further provides that the Player may terminate the Contract and claim all

outstanding salaries if the Club is more than 30 days late with any payment.

13. The Claimants contend that thus far “... Respondent has paid each Claimant only the first scheduled instalment (and said instalment payment to each Claimant was more than 30 calendar days late) of the respective monies listed above and has thereby breached the Agreement. Respondent has never denied it owes the remaining instalments (which were due November 15, 2011 and December 15, 2011) to each Claimant,” allegedly despite further promises from the Respondent that it would be paying the amounts due.
14. As evidence of its foregoing contentions, the Claimants have filed copies of bank statements, of emails exchanged with the Club, and of a notice letter of 19 December 2011 sent to the Club by the Agent on behalf of the Claimants.
15. In essence, in its email messages between November 2011 and mid-February 2012 responding to the Claimants’ requests for payment of the outstanding amounts due under the Settlement Agreement, the person apparently representing the Club in this connection, Mr. Antonello Nevola, does not contest the amounts being claimed but states that the Club is in financial difficulty, is expecting receipt of monies from third parties (sponsors) that will give it the necessary cash flow to meet its obligations, and that payment will be forthcoming. In an email response of 14 February 2012 to the Agent’s representative Mr. Reed Nopponen, Mr. Nevola writes: “Ciao Reed domani dovrebbero arrivare i soldi anche perche ‘ dobbiamo pagare le tasse e ti faccio sapere ... tu vieni a torino ... mi puoi dare notizie di Massimo ciao antonello” (free translation by Claimants: “Ciao Reed tomorrow the money should arrive as also we must pay the taxes and I will let you know ... you coming to torino ... please give me info about Massimo ciao antonello”).
16. The Club having made no further payments to the Claimants as demanded, despite the Club’s promises, they filed a Request for Arbitration with the BAT.

3.2 The Proceedings before the BAT

17. On 22 February 2012, the Claimants filed a Request for Arbitration in accordance with the BAT Rules and duly paid the non-reimbursable handling fee of EUR 4,000.00 on 5 March 2012.
18. On 27 March 2012, the BAT informed the Parties that Mr. Quentin Byrne-Sutton 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 1 (Mr. Szymon Szewczyk)</i> | <i>€ 4,000.00</i> |
| <i>Claimant 2 (Entersport)</i> | <i>€ 500.00</i> |
| <i>Respondent (S.S. Felice Scandone S.p.A.)</i> | <i>€ 4,500.00.”</i> |
19. In the foregoing letter, the BAT also underlined that: *“The Answer shall be filed by the Respondent in accordance with Art. 11.2 of the BAT Rules by no later than **Tuesday, 17 April 2012**”* and reminded the parties that *“... according to Art. 14.2 of the BAT Rules the Arbitrator may proceed with the Arbitration even if the Respondent fails to submit an Answer or to submit his Answer in accordance with Art. 11.2 of the BAT Rules”*.
20. Despite being duly notified of the proceedings, the Respondent failed to submit an Answer within the fixed deadline or to communicate with the BAT in any manner in that connection.
21. Between 2 and 24 April 2012, the Claimants paid their advances on costs and in accordance with Article 9.3 of the BAT Arbitration Rules, those of the Respondent, as the latter had failed to pay its advance.
22. By procedural order of 3 May 2012, the BAT informed the parties that the Arbitrator was requesting the Player file a copy of any contract he had entered into with a new club for part or all of the 2011-2012 season.

23. On the same day, the Agent sent the BAT a copy of a contract signed by the Player on 28 September 2011 with the club SSP Reyer Venezia Meastre Srl for the 2011-2012 and 2012-2013 seasons (the “New Contract”). According to the New Contract, the Player would be receiving a total remuneration of EUR 310,000 for the 2011-2012 season and the Agent a commission of EUR 31,000 for its services in the negotiation of such contract.
24. On 7 May 2012, the BAT wrote to the Club that: “*As per the aforementioned Procedural Order, the Respondent has now the opportunity to comment on the Claimants’ reply by no later than **Friday, 11 May 2012***”.
25. Despite being given this opportunity to comment, the Respondent failed to do so.
26. Consequently, by procedural order of 25 May 2012, the proceedings were closed and the parties invited to submit their statements of costs.
27. On 1 June 2012, the Claimants submitted their statement of costs. The Respondent did not submit any such statement.
28. By procedural order of 4 June 2012, the Respondent was given the opportunity to file comments on the Claimants’ statement of costs but did not do so.

4. The Positions of the Parties

4.1 The Claimants’ Position

29. The Claimants submits the following in substance:
 - In failing to pay the outstanding amounts due under the Settlement Agreement, the Club is in breach of its contractual duties.
 - Under the terms of the Settlement Agreement itself and in particular clause 5

thereof, the Club is therefore liable to the Claimants for all the amounts outstanding while at the same time, the right of the Player to receive his entire remuneration for the 2011-2012 season (EUR 300,000) and the right of the Agent to receive its entire fee (EUR 30,000) are reinstated.

- In accordance with the terms of the Settlement Agreement, the Club is also liable to pay all the costs of the arbitration, including the Claimants' legal fees.
- The Claimants are entitled to "... *accrued interest from the respective dates on each outstanding payment*".

30. In their Request for Arbitration dated 22 February 2012, the Claimants requested the following relief:

"Salary compensation to Mr. Szymon Szewczyk in the amount of 323,000 EUR [three hundred twenty-three thousand Euros] (23,000 EUR for the 2010-11 season and 300,000 EUR for the 2011-12 season); agent fees to Reed Nopponen/Entersport in the amount of 40,500 EUR [forty thousand five hundred Euros] (10,500 EUR for the 2010-11 season and 30,000 EUR for the 2011-12 season); costs of this Arbitration; and accrued interest from the respective due dates of each outstanding payment."

4.2 Respondent's Position

31. As previously stated, despite several invitations to participate, the Club did not make any submissions in these proceedings.

5. The Jurisdiction of the BAT

32. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Respondent did not participate in the arbitration, he will examine his jurisdiction *ex officio*, on the

basis of the record as it stands.¹

33. 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).
34. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
35. 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.²
36. The jurisdiction of the BAT over the dispute results from the arbitration clause contained under Clause 7 of the Settlement Agreement (and the identical clause contained under Clause 10 of the Contract), which reads as follows:
- “Any dispute arising from or related to the present contract shall be submitted to the FIBA 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 (PIL), irrespective of the parties’ domicile. The language of the arbitration shall be English. The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono.”*
37. The foregoing arbitration agreement is in written form and thus fulfils the formal requirements of Article 178(1) PILA.
38. 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).

¹ ATF 120 II 155, 162.

² Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.

39. For the above reasons, the Arbitrator has jurisdiction to adjudicate the claims against the Club.

6. Discussion

6.1 Applicable Law – *ex aequo et bono*

40. 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”.

41. 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.”

42. Clause 8 of the Settlement Agreement stipulates that Swiss law governs it. However, the last sentence of the arbitration clause (clause 7 of the Settlement Agreement) provides that if and when any dispute is submitted to the BAT: *“The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono”.*

43. Consequently, the Arbitrator shall decide *ex aequo et bono* the claims brought by the Claimants against the Club in this arbitration in front of the BAT.

44. 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'arbitrage³ (Concordat)⁴, 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.”⁵

45. 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*”.
46. In light of the foregoing considerations, the Arbitrator makes the findings below.

6.2 Findings

47. Despite having ample opportunity to make submissions, the Respondent did not contest the Claimants’ allegations as to the facts of their claims, nor did it challenge the evidence adduced in that connection.
48. Furthermore, on their face, the notices sent to the Club, the bank statements and the exchanges of emails between the Claimants’ and the Club confirm the reality of the Claimants allegations as to the facts; and there is no indication or evidence on record that would lead the Arbitrator to conclude that the Claimants are being untruthful in any manner.
49. For the above reasons, the Arbitrator finds that the payments listed under the

³ 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).

⁴ P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

⁵ JdT 1981 III, p. 93 (free translation).

Settlement Agreement which Claimants allege to remain unpaid are effectively proven to be outstanding, i.e. EUR 15,000 (to be paid by 15 November 2011) and EUR 8,000 (to be paid by 15 December 2011) for the Player and EUR 6,000 (to be paid by 15 November 2011) and EUR 4,500 (to be paid by 15 December 2011) for the Agent.

50. Since there is no established contractual motive or any reason of fairness or justice for which the Claimants should not be entitled to claim the foregoing outstanding payments due to them under the Settlement Agreement, those amounts being claimed will be awarded.
51. On the other hand, the Arbitrator finds that for reasons of fairness and justice the Player and the Agent are not entitled to claim, in addition, the entire amount originally owed to each of them under the Contract (i.e. EUR 300,000 for the Player and EUR 30,000 for the Agent). Indeed, the Arbitrator finds that the rationale of the Settlement Agreement is for the Claimants to be paid outstanding sums but not for them to become enriched, while - thanks to the fact that according to the terms of the Settlement Agreement the Player became immediately free to play for a new club - under the New Contract for the same season (2011-2012) both of them are earning more than the entire amount originally owed to them under the Contract.
52. Any other solution would be unfair and would unduly enrich the Claimants, particularly because in getting paid the outstanding sums stipulated as due in November and December 2011 under the Settlement Agreement, the Claimants will be benefitting from such payments in addition to the amounts received under the New Contract which was signed on 29 September 2011, the day before the signature of the Settlement Agreement.
53. Therefore, the Claimants' requests for payment of EUR 300,000 (Player) and of EUR 30,000 (Agent) - grounded on the argument that the right to such amounts under the Contract was reinstated as a form of penalty for late payment - are dismissed.
54. The Claimants are also requesting the payment of interest on the sums owed.

55. Although the Settlement Agreement does not expressly 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 contracts not specifying an interest rate, it is normal and fair that interest is due on the late payments. In this case, it seems fair and reasonable to award interest at a rate of 5% per annum, in line with BAT jurisprudence.
56. It is an established principle that interest runs from the day after the date on which the principal amounts are due.
57. Consequently, it is fair that, with respect to the instalments provided under the Settlement Agreement, the amounts owed will bear interest from the day after their due date stipulated in that agreement.

7. Costs

58. 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.
59. On 20 July 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 6,500.00.

60. Considering that the Settlement Agreement provides that the Club shall bear all the Claimants' legal fees associated with any BAT proceeding initiated to recover amounts due under that agreement, that the Claimants showed some patience before filing their request for arbitration and that the Club was put on notice that a claim would be filed with the BAT failing payment, 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 Claimants, the latter (EUR 4,000.00) being reasonable in amount.
61. Given that the Claimants paid advances on costs of EUR 9,000.00 as well as a non-reimbursable handling fee of EUR 4,000.00 (which will be taken into account when determining the Claimant's legal fees and expenses), while the Club failed to pay any advance on costs, the Arbitrator decides that in application of article 17.3 of the BAT Rules:
- (i) BAT shall reimburse EUR 2,500.00 to the Claimants, being the difference between the costs advanced by the them and the arbitration costs fixed by the BAT President;
 - (ii) The Club shall pay EUR 6,500.00 to the Claimants, being the difference between the costs advanced by the Claimants and the amount they are going to receive in reimbursement from the BAT;
 - (iii) The Club shall pay to the Claimants EUR 8,000.00 (4,000.00 for the non-reimbursable fee + 4,000.00 for legal fees) representing the amount of their legal fees and other expenses.

8. AWARD

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

- 1. S.S. Felice Scandone S.p.A. shall pay Mr. Szymon Szewczyk an amount of EUR 15,000.00 as compensation for unpaid remuneration under the Settlement Agreement, plus interest at 5% per annum on such amount from 16 November 2011 onwards.**
- 2. S.S. Felice Scandone S.p.A. shall pay Mr. Szymon Szewczyk an amount of EUR 8,000.00 as compensation for unpaid remuneration under the Settlement Agreement, plus interest at 5% per annum on such amount from 16 December 2011 onwards.**
- 3. S.S. Felice Scandone S.p.A. shall pay Entersport an amount of EUR 6,000.00 as compensation for unpaid remuneration under the Settlement Agreement, plus interest at 5% per annum on such amount from 16 November 2011 onwards.**
- 4. S.S. Felice Scandone S.p.A. shall pay Entersport an amount of EUR 4,500.00 as compensation for unpaid remuneration under the Settlement Agreement, plus interest at 5% per annum on such amount from 16 December 2011 onwards.**
- 5. S.S. Felice Scandone S.p.A. shall pay Mr. Szymon Szewczyk and Entersport an amount of EUR 6,500.00 as reimbursement for their arbitration costs.**
- 6. S.S. Felice Scandone S.p.A. shall pay Mr. Szymon Szewczyk and Entersport an amount of EUR 8,000.00 as reimbursement for their legal fees and expenses.**



BASKETBALL
ARBITRAL TRIBUNAL

7. Any other or further-reaching requests for relief are dismissed.

Geneva, seat of the arbitration, 25 July 2012.

Quentin Byrne-Sutton
(Arbitrator)