



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0289/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr. Dimitri Lauwers

- Claimant -

represented by Ms. Fulvia Orecchio, attorney-at-law,

vs.

S.S. Felice Scandone S.p.A.
c/o PalaDelMauro - c/da Zoccolari,
83100 Avellino, Italy

- Respondent -

1. The Parties

1.1 The Claimant

1. Mr. Dimitri Lauwers (hereinafter the "Player") is a professional basketball player born in Liege, Belgium. He is represented by Ms. Fulvia Orecchio, attorney-at-law in Ragusa, Italy.

1.2 The Respondent

2. S.S. Felice Scandone S.p.A. (hereinafter the "Club") is a professional basketball club located in Avellino, Italy. The Club is not represented in this arbitration.

2. The Arbitrator

3. On 4 June 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 27 July 2009, the Player and the Club entered into an employment agreement (hereinafter the "Player Contract") whereby the Club engaged the Player for three basketball seasons, i.e. the 2009/2010, the 2010/2011 and the 2011/2012 season. According to Clause 2 of the Player Contract, the Club agreed to pay to the Player a *"fully guaranteed Base Salary, net of any applicable taxes"* of EUR 160.000.00 for the

2009/2010 season and of EUR 180.000.00 for each, the 2010/2011 and the 2011/2012 seasons.

5. The Player played for the Club's team from the beginning of the 2009/2010 season until February 2012.
6. On 29 February 2012 the Player and the Club agreed to terminate the Player Contract with immediate effect and signed a termination agreement (hereinafter the "Termination Agreement") according to which the Club had to pay to the Player the amount of EUR 170,000.00 net as follows:
 - € 25.000,00 (twenty five thousand/00) by and no later than March 10th 2012;
 - € 25.000,00 (twenty five thousand/00) by and no later than April 10th 2012;
 - € 25.000,00 (twenty five thousand/00) by and no later than May 10th 2012;
 - € 25.000,00 (twenty five thousand/00) by and no later than June 10th 2012;
 - € 25.000,00 (twenty five thousand/00) by and no later than July 10th 2012;
 - € 25.000,00 (twenty five thousand/00) by and no later than August 10th 2012;
 - € 20.000,00 (twenty thousand/00) by and no later than September 10th 2012;"
7. The Parties agreed in the Termination Agreement that if the Club would fail to make the above-mentioned payments within 15 days becoming due, the Player would be entitled "to receive the full remaining total amount of [EUR] 191,100.00" as provided in the Player Contract and that this unpaid amount should "become immediately due and payable".
8. The Club did not effect the payment due on 10 March 2012.
9. By fax letter of 4 April 2012, the Italian Basketball Players Association (GIBA) asked the Club to pay within five days EUR 191,100.00 to the Player. Otherwise, an "application" on behalf of the Player would be filed with the BAT. To date, the amount of EUR 191,100.00 is still outstanding and is therefore the subject matter of these proceedings.

10. On 19 April 2012, the Player signed a new employment contract with the Belgian basketball club “Oostende” for the remainder of the 2011/2012 season. The Player received a total salary of EUR 5,000.00 from his new club.

3.2 The Proceedings before the BAT

11. On 10 May 2012, the BAT Secretariat received the Player’s Request for Arbitration dated 6 May 2012 and several attachments. The non-reimbursable handling fee of EUR 3,000.00 was received in the BAT bank account on 8 May 2012.
12. By letter of 6 June 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 28 June 2012. The BAT Secretariat also requested the Parties to pay the following amount as an Advance on Costs by no later than 19 June 2012:

<i>“Claimant (Mr. Lauwers)</i>	<i>EUR 4,000</i>
<i>Respondent (SS Felice Scandone Spa)</i>	<i>EUR 4,000”</i>

13. By letter of 29 June 2012, the BAT Secretariat acknowledged receipt of the Player’s share of the Advance on Costs. In addition, the BAT Secretariat informed the Parties that the Club had failed to submit an Answer and to pay its share of the Advance on Costs and consequently noted that in accordance with Article 9.3 of the BAT Rules, the arbitration would not proceed until the full amount of the Advance on Costs was received. Therefore, the Player was requested to effect payment of the Club’s share of the Advance on Costs in the amount of EUR 4,000.00 by no later than 10 July 2012. Furthermore, the Club was granted a final opportunity to file an Answer to the Request for Arbitration by no later than 5 July 2012.

14. By letter of 19 July 2012, the BAT Secretariat informed the Parties that it had received the full amount of the Advance on Costs (paid in full by the Player), and further, that the Club had still failed to submit an Answer. By the same letter, the Arbitrator invited the Player to provide the BAT with further documents and information by no later than 27 July 2012.
15. On 27 July 2012, the Player replied to the procedural order of 19 July 2012 and submitted further documents and information.
16. By email of 1 August 2012, the BAT Secretariat forwarded the Player's reply to the Club and invited it to submit its comments on the Player's submissions by no later than 9 August 2012.
17. By letter of 16 August 2012, the BAT Secretariat informed the Parties that the Club had failed to provide the BAT with comments on the Claimant's submissions as requested in BAT's correspondence of 1 August 2012. Furthermore, the Parties were informed 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 27 August 2012.
18. On 20 August 2012 the Player submitted an account of costs as follows:

"Claimant's detailed account of costs
BAT fee: Euros 8,000.00 as requested from BAT Secretariat.
Legal fees and expenses: Euros 15,000.00"
19. The Club did not submit any account of costs.
20. By email of 29 August 2012, the BAT Secretariat acknowledged receipt of the Player's account of costs and invited the Club to submit its comments, if any, on the Player's

account of costs by no later than 5 September 2012. The Club did not file any comments.

21. The Parties did not request the BAT hold a hearing. The Arbitrator therefore decided in accordance with Article 13.1 of the BAT Rules not to hold a hearing and to deliver the award on the basis of the written submissions available.

4. The Positions of the Parties

4.1 The Claimant's Position

22. The Player submits the following in substance:

- The Player has been paid by the Club for the 2009/2010 season in full, however after the 2010/2011 season an amount of EUR 11,100.00 remained unpaid. In the 2011/2012 season, the Player did not receive any payments from the Club.
- According to the Termination Agreement, the Player was entitled to receive the total amount of EUR 170,000.00. However, in case of non-payment within 15 days after the due dates of the agreed instalments, the Player was entitled to request payment of *"full remaining total amount"* of EUR 191,100.00. This amount corresponds to the total salary of EUR 180,000.00 for the 2011/2012 season and an outstanding amount of EUR 11,100.00 for the 2010/2011 season.
- The first instalment under the Termination Agreement in the amount of EUR 25,000.00 was due by 10 March 2012 but has not been paid until today. On behalf of the Player the GIBA notified the Club by fax letter of 4 April 2012 about the Player's right to immediately receive the *"full remaining total amount"* of EUR 191,100.00 as a consequence of the Club's default. To date, this amount is still outstanding.

- The Player's salary of EUR 5,000.00 earned with his new club "Oostende" is irrelevant regarding the present proceedings and the Player's claim. As expressly provided in the Termination Agreement, the Player had the right to sign a new employment contract with another club while the Club remained obliged to pay the agreed amount (EUR 170.000,00 or EUR 191,100.00 in case of default).

4.2 The Claimant's Request for Relief

23. In its Request for Arbitration, the Player requests the following relief:

"The Claimant requests the BAT should declare his right to receive from the Respondent, and order the Club to pay the Player the amount of Euros 191,100.00, as provided into the settlement signed, with legal interests. Moreover the Claimant requests the BAT should force the Club to pay all costs involved (legal expenses, BAT fee etc.)"

4.3 The Respondent's Position and Request for Relief

24. 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

25. 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.
26. 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).

27. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the Parties.
28. 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.
29. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in the final paragraph of the Termination Agreement. The Player Contract contains also an arbitration clause in favour of the BAT (or FAT). However, since the claim is exclusively based on the Termination Agreement, the validity of the arbitration clause in the Player Contract does not need to be reviewed. The arbitration clause contained in the final paragraph of the Termination Agreement reads as follows:
- “Any disputes arising or related to the present Agreement shall be submitted to the FIBA Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved definitely in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties’ domicile. The seat of the arbitration shall be Geneva, Switzerland. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono.”*
30. The Termination Agreement is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.
31. 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). In particular, the wording *“[a]ny disputes arising or related to the present Agreement”* in the final paragraph of the Termination Agreement covers the present dispute.
32. For the above reasons, the Arbitrator finds that he has jurisdiction to adjudicate the Player’s claims.

6. Respondent's failure to submit an Answer

33. Article 14.2 of the BAT Rules, which the Parties have declared to be applicable in the arbitration agreement, 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.
34. 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 Player's Request for Arbitration and to the Player'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*

35. 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”.

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

36. 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."

37. In the arbitration agreement in the final paragraph of the Termination Agreement, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono* (see par. 28 above).

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 Player requests the amount of EUR 191,100.00 net plus interest.

8.1 Is the Player entitled to the amount of EUR 191,100.00?

41. According to the Termination Agreement, the Player was entitled to the total amount of EUR 170,000.00 to be paid in seven installments as scheduled in the Termination Agreement. The first installment of EUR 25,000.00 was due by 10 March 2012. In the absence of any response from the Club and since there is no indication to the contrary, the Arbitrator must rely on the Player's submission according to which that first installment (or any other of the agreed installments) was not paid on or after 10 March 2012.

42. The Arbitrator has no reason to doubt about the validity and enforceability of the Termination Agreement. He also finds that the Termination Agreement unequivocally stipulates the consequences of such non-payment, namely that the Club is obliged to pay the full outstanding amount of EUR 191,100.00 to the Player if the Club fails to pay any of the agreed installments *“within 15 (fifteen) days as and when due”*.
43. Since, according to the uncontested submissions of the Player, the Club never paid any of the agreed installments, the outstanding amount aggregates to EUR 191,100.00. The Termination Agreement provides that this amount *“shall become immediately due and payable”*. This means that no further request by the Player was necessary to cause the payment of EUR 191,100.00 to the Player. Accordingly, the claimed amount became due on 26 March 2012, i.e. 16 days after the due date of the first installment.
44. During the remaining term of the Player Contract, the Player earned an amount of EUR 5,000.00 which he received from his new club “Oostende”. According to generally accepted principles of the law of damages and also of labor law, any amounts the Player earned during the remaining term of the Player Contract must be deducted. This has also repeatedly been confirmed by the BAT.² It is yet true that the last half-sentence of the second last paragraph of the Termination Agreement says: *“... and our club will not be entitled to request or receive any payments pertaining to him playing basketball anywhere in the world in the future”*. However, this half-sentence must be read in the context of the entire paragraph which is intended to make sure that the Player may join a new club as a free agent without any right of the Club to receive any transfer payments or the like. On the other hand, the Arbitrator finds that this clause does not address the Player’s duty to mitigate the damage to the Club and the obligation to deduct the salaries earned with a new club during the remaining term of

² See, e.g. BAT 0237/11, *Nikola Ivanovic and GPK Sports Management Limited v. Kolossos Rhodes BC*.

the Player Contract. The Player must therefore accept that the salary which he earned with Oostende must be deducted from the compensation due under the Termination Agreement which results in an outstanding amount of EUR 186,100.00.

8.2 Is the Player entitled to interest?

45. In addition, the Player requests interest on the open amount without indicating any specific interest rate or commencement date.
46. The Termination Agreement does not provide for the payment of default interest. Also in the GIBA's letter of 4 April 2012, no interest was claimed and there is no evidence on record which would indicate that interest was ever requested before filing the Request for Arbitration.
47. Clause 2 of the Player Contract (second last paragraph) stipulates an "interest penalty" of EUR 50.00 per day with regard to payments due to the Player. However, the Arbitrator finds that this penalty clause applies only to the salary payments under the Player Contract ("*any payment to the Player pursuant to the above shall be subject to an interest penalty*") but not to the payment stipulated in the Termination Agreement. In the Termination Agreement, the Parties explicitly agreed that the only consequence of a delay in paying the agreed amounts was the immediate maturity of the full unpaid amount whereas the late payment penalty applied only to the salary instalments payable under the Player Contract.
48. According to BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest³. This is a

³ 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*

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.

49. The Arbitrator, deciding *ex aequo et bono* and taking into consideration that the Player has claimed interest only in the Request for Arbitration with the BAT, finds that the starting date for the calculation of the default interest shall be the day when the Request of Arbitration was received by the BAT, i.e. 10 May 2012.
50. Regarding the interest rate, the Arbitrator, still deciding *ex aequo et bono* and in line with BAT jurisprudence, considers interest in the rate of 5% p.a. to be fair and equitable in the present case without reference to any national law.
51. Consequently, the Arbitrator finds that the Player is entitled to interest of 5% p.a. on the amount of EUR 186,100.00 from 10 May 2012.

9. Costs

52. 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.
53. 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 7,130.00.

54. 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.
55. Given that the Player 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 870.00 to the Player;
 - (ii) the Club shall pay to the Player the difference between the costs advanced by the Player and the amount which is going to be reimbursed to him by the BAT, i.e. EUR 7,130.00.
56. Furthermore, the Arbitrator considers it adequate that the Player is entitled to a contribution towards his legal fees and other expenses (Article 17.3. of the BAT Rules). The Player's account of costs indicates without further details the amount of EUR 15,000.00 for legal fees and expenses incurred in connection with this arbitration. However, this amount exceeds the maximum contribution to a party's reasonable legal fees and other expenses (including the non-reimbursable handling fee) according to Article 17.4 of the applicable BAT Rules. Considering that the Player's counsel filed only two short submissions while the Respondent did not file any submissions at all, the Arbitrator deems it appropriate to fix the legal fees at EUR 5,000.00 to which the non-reimbursable handling fee of EUR 3,000.00 must be added, and to hold that the Club shall reimburse the amount of EUR 8,000.00 to the Player.

10. AWARD

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

- 1. S.S. Felice Scandone S.p.A. is ordered to pay to Mr. Dimitri Lauwers the net amount of EUR 186,100.00 plus interest of 5% p.a. since 10 May 2012.**
- 2. S.S. Felice Scandone S.p.A. is ordered to pay to Mr. Dimitri Lauwers the amount of EUR 7,130.00 as a reimbursement of his advance on arbitration costs.**
- 3. S.S. Felice Scandone S.p.A. is ordered to pay to Mr. Dimitri Lauwers the amount of EUR 8,000.00 as a contribution towards his legal fees and expenses.**
- 4. Any other or further-reaching prayers for relief are dismissed.**

Geneva, seat of the arbitration, 17 October 2012

Stephan Netzle
(Arbitrator)