BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0323/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert SC

in the arbitration proceedings between

Octagon, Inc.
7950 Jones Branch Drive, Suite 700N, McLean, VA 22107, USA

- Claimant -

represented by Mr. Paul Haase, Octagon, Inc.,
7950 Jones Branch Drive, Suite 700N, McLean, VA 22107, USA

vs.

Halcones UV Promotora Deportiva A.C.
Av. de las Culturas Veracruzanas Num. 101,
Colonia Emiliano Zapata C.P., 91090 Jalapa, Veracruz, Mexico

- Respondent -

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1. The Parties

1.1 The Claimant

1. Octagon, Inc. (hereinafter referred to as “Claimant”) is a basketball agency which represented a professional basketball player, Mr. Adam Parada, leading to the latter’s retainer by Respondent by agreement dated 27 July 2010.

1.2 The Respondent

2. Halcones UV Promotora Deportiva A.C. (hereinafter referred to as “Respondent”) is a professional basketball club in Jalapa, Mexico.

2. The Arbitrator

3. On 9 September 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

4. On 27 July 2010, Mr. Adam Parada and Respondent entered into an agreement whereby the latter engaged Mr. Parada to play basketball for the 2010-2011 season and the 2011-2012 season (“the Parada Agreement”). The Parada Agreement provided for a salary of USD 427,000.00 throughout its lifetime.

5. The Parada Agreement provided for a 10% agency fee.

6. On 23 November 2011, Claimant and Respondent entered into an agreement entitled "Agreement between parts" ("the Parada Fee Acknowledgement") whereby Respondent confirmed that it had not paid the agency fee payable under the Parada Agreement and was confirming that it would pay the sum of USD 42,700.00 to Claimant in respect of this obligation by no later than 31 December 2011.

7. Claimant was not paid the agency fee of USD 42,700.00.

3.2 The Proceedings before the BAT

8. Claimant filed a Request for Arbitration dated 14 September 2012 in accordance with the BAT Rules. A combined Request for Arbitration for two cases was filed on 7 August 2012 and by order of the President of BAT, the matters were deconsolidated on 10 September 2012.

9. The non-reimbursable handling fee in the amount of EUR 2,000.00 was paid on 9 August 2012.

10. On 17 September 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 (Octagon, Inc.)	*EUR 3,500*
Respondent (Halcones UV Jalapa)	*EUR 3,500"*

The foregoing sums were paid as follows (all on behalf of Claimant): 27 September 2012, EUR 3,500.00; and 31 October 2012, EUR 3,500.00.

11. Respondent did not participate in the arbitration and did not file an Answer, despite several invitations by the BAT to do so.

12. On 7 November 2012, the Parties were invited to submit their statements of costs by 16 November 2012 and were notified that the exchange of documentation was closed in accordance with Article 12.1 of the BAT Rules.

13. On 13 November 2012, Claimant submitted its statement of costs claiming EUR 4,720.00. Respondent did not submit any costs.

14. Respondent was afforded an opportunity to comment on the costs sought by Claimant but did not take up that opportunity.

15. On 10 January 2013, the Arbitrator sought clarification from Claimant on one point regarding the relief sought (whether it was overlapping with case BAT 0315/12). This was satisfactorily answered by Claimant on 11 January 2013.

4. The Positions of the Parties

16. Claimant says that the money due to it has not been paid. It advances two bases of argument in the Request for Arbitration: (a) breach of contract, which speaks for itself, and (b) unjust enrichment, namely Respondent accepted the benefit but has not paid and is therefore correspondingly unjustly enriched.

17. In the Request for Arbitration, Claimant requested the following relief:

    1. USD 42,700.00 for the unpaid agency fees;

    2. Costs, fees, expenses including reasonable attorneys' fees.

18. As already noted, despite several invitations by the BAT, Respondent did not participate in this arbitration.

5. The Jurisdiction of the BAT

19. As a preliminary matter, the Arbitrator wishes to emphasize that, since Respondent did not participate in the arbitration, he will examine his jurisdiction *ex officio*, on the basis of the record as it stands.

20. 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).

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

22. 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].

23. The jurisdiction of the BAT over Claimant's claims is stated to result from the arbitration clause of the Parada Agreement, which reads as follows (the reference to FAT is the former name of BAT; see Articles 1 and 18 of the BAT Rules):

> *"Any dispute under this AGREEMENT shall be submitted in the first instance to the LNBP 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 with the FAT Arbitration rules by a single arbitrator 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),*

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

irrespective of the parties domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono." [sic]

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

25. 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). There are some typographical errors but none which could conceivably render the arbitration clause invalid.

26. The Arbitrator notes that the arbitration clause refers both to the "LNBP" (the Mexican professional basketball league) as well as to the BAT (formerly known as FAT). The Arbitrator finds that the addition of the words "in the first instance to the LNBP" to the template BAT clause does not affect the jurisdiction of the BAT in this case. Indeed, the LNBP is a body which organises a basketball league and not a dispute resolution body. Further, there is no indication of how a decision of the LNBP would be reviewed by the BAT, since the latter has been created as a first (and last) instance arbitral tribunal. In addition, in its letter dated 12 March 2012 to the Respondent, Claimant reserved its right to directly file "for arbitration before the Basketball Arbitral Tribunal". This letter remained unanswered by the Respondent. It is clear to the Arbitrator that the parties intended to confer jurisdiction to the BAT in the arbitration clause of the Parada Agreement.

27. For these reasons, the Arbitrator finds that the jurisdiction of BAT over the claims arises from the Parada Agreement in combination with the Parada Fee Acknowledgement. The wording "*Any dispute arising from or related to the present contract* …" clearly covers the present dispute save for a matter which will be discussed below (paras. 28 – 35) in further detail.

28. The Arbitrator notes that Claimant is not stated to be a party to the Parada Agreement

which is the document with the arbitration clause. Claimant is certainly a party to the Parada Fee Acknowledgment.

29. The question therefore arises as to whether Claimant is a valid party to the arbitration clause in the Parada Agreement by reason of the Parada Fee Acknowledgement.

30. The Parada Fee Acknowledgement, in relevant part, states the following:

> *"Both parties agree that Halcones is delinquent in paying the fee due to Agent for the services of Mr. Adam Parada. According to the contract between Halcones and Adam Parada dated July 27, 2010, Halcones must pay agent 10% of guaranteed contract of Adam Parada. The contract is guaranteed for a total of $427,000 USD. Thereby, Halcones agrees to pay Agent $42,700USD no later than December 31, 2011."*

31. The Parada Fee Acknowledgement recites the parties thereto in its title and these are Claimant and Respondent.

32. The Arbitrator is of the view, having taken into account the terms of the Parada Fee Acknowledgement, that upon its signature Claimant became a valid party to the arbitration clause in the Parada Agreement. Respondent explicitly agreed in this document to pay Claimant an agreed sum of money in the context of the Parada Agreement. On the Arbitrator's interpretation of the Parada Fee Acknowledgement and the Parada Agreement, the Respondent agreed to include Claimant in the terms of the Parada Agreement and also the arbitration clause contained therein.

33. In any event, the Arbitrator has had the benefit of considering BAT jurisprudence on this topic and refers to case 0257/12, paras. 37-39 inclusive of the Award in that case. In summary, once an arbitration agreement complies with the formal requirements with respect to its initial signatories, the extension of that arbitration agreement to other parties does not need to satisfy such requirements. Extension in such circumstances requires a legal relationship between the third party and the initial parties to the arbitration agreement which must be of a certain intensity to justify the extension.

34. In the context of the Parada Agreement, Claimant is plainly the agent of Mr. Parada, and has signed the subsequent Parada Fee Acknowledgement in which there is an express assumption of liability by Respondent to Claimant for long outstanding agency fees arising from the Parada Agreement. In these circumstances, the Arbitrator considers it justified to extend the arbitration clause in the Parada Agreement to encompass Claimant as a party.

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

6. Discussion

6.1 Applicable Law – ex aequo et bono

36. 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".*

37. 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."*

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

39. 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]

40. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives *"a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case."*[5]

41. 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*."

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

6.2 Findings

43. 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).

5 Poudret/Besson, Comparative Law of International Arbitration, London 2007, No. 717. pp.625-626.

44. The Claimant's bases of claim, breach of contract and unjust enrichment, appear to the Arbitrator to amount to the same thing. A party cannot have the benefit of a contract without the corresponding burden. A party cannot commit in a written contract to do certain things and then not do them. These are all the concepts well established in BAT jurisprudence and while the articulation of the counts in the Request for Arbitration are similar to a common law approach to contract claims, the overall approach of *pacta sunt servanda* combined with justice and equity comports more with the express choice of *ex aequo et bono* in an international basketball context.

45. The Parada Fee Acknowledgement is a key document in the assessment of the merits of this case. It unequivocally shows that Respondent was in default of its obligations under the Parada Agreement. Respondent has unequivocally accepted and admitted its liabilities to Claimant.

46. The Arbitrator finds that Claimant's claim for USD 42,700.00 is well founded. This is explicitly and unequivocally accepted on the face of the Parada Fee Acknowledgement by Respondent.

7. Costs

47. 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.

48. On 19 February 2013 – 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 5,480.00.

49. Considering that Claimant prevailed in its 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.

50. The Claimant's claim for legal fees and expenses amounts to EUR 4,720.00.

51. Claimant's claim was for USD 42,700.00, which is approximately EUR 33,580.00 as per the costs claim dated 13 November 2012. The BAT Rules place a maximum costs contribution of EUR 7,500.00 for a claim of this magnitude. The Arbitrator considers that a claim EUR 3,750.00 is reasonable and proportionate both by reference to the sums claimed, the sums awarded and the amount of documentation put before the Arbitrator. This claim was unopposed.

52. 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 Respondent.

53. Given that Claimant paid advances on costs of EUR 7,000.00, as well as a non-reimbursable handling fee of EUR 2,000.00 (which, as noted above, is taken into account when determining Claimant's legal expenses), the Arbitrator decides that in application of article 17.3 of the BAT Rules:

    (i) BAT shall reimburse EUR 1,520.00 to Claimant, being the difference between the costs advanced by it and the arbitration costs fixed by the BAT President;

    (ii) Respondent shall pay EUR 5,480.00 to Claimant, being the difference between

the costs advanced by it and the amount it is going to receive in reimbursement from the BAT;

(iii) Respondent shall pay EUR 5,750.00 to Claimant representing the amount of its legal fees and expenses.

8. AWARD

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

1. **Halcones UV Promotora Deportiva A.C. shall pay Octagon, Inc. USD 42,700.00 for unpaid agency fees.**

2. **Halcones UV Promotora Deportiva A.C. shall pay Octagon, Inc. EUR 5,480.00 as reimbursement for its arbitration costs.**

3. **Halcones UV Promotora Deportiva A.C. shall pay Octagon, Inc. EUR 5,750.00 as reimbursement for its legal fees and expenses.**

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

Geneva, seat of the arbitration, 26 February 2013

Klaus Reichert SC
(Arbitrator)