



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0329/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Quentin Byrne-Sutton

in the arbitration proceedings between

Mr. Gerald Green, Jr.

represented by Mr. Sébastien Ledure,
Boulevard du Régent 37-40, 1000 Brussels, Belgium

- Claimant -

vs.

BC Krasnye Krylia Samara,
Sovetskoy Armii Str. 253a-340, Samara 443011, Russia

- Respondent -

1. The Parties

1.1 The Claimant

1. Mr. Gerald Green, Jr. is an American professional basketball player (hereinafter referred to as “the Player” or “the Claimant”).

1.2 The Respondent

2. BC Krasnye Krylia Samara is a Russian professional basketball club (hereinafter also referred to as “the Club” or “the Respondent”).

2. The Arbitrator

3. On 19 October 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

4. On 31 July 2010, the Claimant and the Club entered into a contract for the 2010/2011 season (“the Agreement”), whereby the Player would receive a total salary of USD 675,000 to be paid in 12 monthly installments.
5. According to clause IV of the Agreement:

“In case of scheduled payments not being made by the Club within 20 (twenty) days of

the scheduled payment date to the Player or the Agent, the Player and Agent shall be entitled to all of the money due in accordance with the Contract, but the Player shall not have to perform in practice sessions or games until all scheduled payments have been made plus appropriate penalties. The Late Payment Penalty shall be US.\$100 (One Hundred U.S. Dollars) per day for each day the Club is late in making a scheduled payment to Player. Such non-performance by Player shall not be considered a breach of contract by the Player. In the event that payments are not made by Club, within 30 (thirty) days of the scheduled payment date(s), Player shall immediately be entitled to the entire Salary Compensation set forth in Section IV of this Contract and shall have no further legal or playing obligations to the Club. Upon receipt of a request from the National Federation to issue the Player's Letter of Clearance, the Club must authorize the Federation to do so unconditionally within 24 (twenty four) hours without charging a transfer fee or any other kind of fee whatsoever to the Player or any third party".

6. The Player contends that at the end of the 2010/2011 season, he was owed a total salary amount of USD 73,065 by the Club, for the monthly installments of May 2011 (USD 20,565 outstanding) and June 2011 (USD 52,500 outstanding).
7. On 7 June 2011, in a first letter of notice, the Claimant's agent put the Club on notice to pay the outstanding amount of the Player's May 2011 salary and a penalty of USD 2,400 (corresponding to USD 100 per day for a period of 24 days of delay), and indicated that "... *Mr. Green will not participate in any more games, practices or team functions until he is fully compensated in accordance to Article IV.*" The Claimant's agent added that if payment was not forthcoming within 7 days, the Player would initiate legal proceedings with the FIBA Arbitral Tribunal (BAT's former name) to "... *claim payments of all the amounts due in principal, late interests, and legal expenses. As such, please consider this reminder as a final warning*".
8. On 9 September 2011, in a second letter of notice, the Claimant's agent notified the Club that USD 71,000 in salary payments were outstanding by then and requested the immediate payment of half of such amount, i.e. of USD 35,000.
9. In an undated document, the Club issued a written statement guaranteeing that it would pay its debt towards the Player and that, with respect to the payment: "*The tentative date will be November 1st, 2011*".
10. On 28 March 2012, the Claimant's legal counsel sent a third notice to the Club advising

it that since the latter had still not paid the principal amount owed, despite reminders, “... our Client has instructed us to initiate proceedings before the Basketball Arbitral Tribunal in Geneva, in accordance with Article XIII of the Agreement”.

11. On 15 June 2012, having still received no part of the outstanding contractual salary being claimed, the Player filed a Request for Arbitration with the BAT.

3.2 The Proceedings before the BAT

12. On 15 June 2012, the Claimant filed a Request for Arbitration in accordance with the BAT Rules and on 3 October 2012 paid EUR 1,952.06 towards the non-reimbursable handling fee.

13. On 26 October 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:

“Claimant (Mr. Gerald Green)	EUR 4,047.94
Respondent (Krasnye Krylia Samara)	EUR 4,000”

14. 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 **Friday, 16 November 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”.
15. On 6 November 2012, the Claimant paid a portion of its Advance on Costs in an amount of EUR 3,977.86, meaning that an outstanding portion of EUR 70.08 remained outstanding.

16. Furthermore, the Respondent failed to pay its portion of the Advance on Costs and to submit an Answer within the fixed deadlines or to communicate with the BAT in any manner in that connection.
17. Consequently, by procedural order of 21 November 2012, the BAT informed the Parties that in accordance with the BAT Rules, for the matter to proceed, the Claimant must pay the balance of its share of Advance on Costs and substitute for the Respondent. At the same time, the procedural order stipulated that: “*The Respondent is granted a final opportunity to file an Answer to the Request for Arbitration by no later than **Tuesday, 27 November 2012**. The Respondent is hereby given notice of the fact that, in accordance with Article 14.2 of the BAT Rules, if the Respondent fails to submit an Answer the Arbitrator may nevertheless proceed with the arbitration and deliver an award*”.
18. Despite the foregoing reminder, the Club did not submit an Answer or communicate with the BAT in that regard.
19. On 30 November 2012, the Claimant paid the balance of his Advance on Costs and substituted for the Respondent by paying the latter’s portion.
20. Consequently, by procedural order of 3 December 2012, the proceedings were closed and the Parties invited to submit their statements of costs.
21. On 5 December 2012, the Claimant submitted his statement of costs. The Respondent did not submit any such statement.
22. By procedural order of 11 December 2012, the Respondent was given the opportunity to file comments on the Claimants’ statement of costs by 17 December 2012 but did not do so.

4. The Positions of the Parties

4.1 The Claimant's Position

23. The Claimant submits the following in substance:

- The Respondent contractually owes the principal amounts being claimed and has recognized that debt.
- The Club is also liable to pay the EUR 100/day contractual penalty for late payment, and it is fair that such penalty be calculated as running from the date of the late salary payments until the date of filing of the Request for Arbitration.
- It is also fair that interest for late payments be awarded and that it run from the date of the final award onwards.

24. In his Request for Arbitration dated 15 June 2012, the Claimant requested the following relief:

“Respondent is liable to pay to Claimant the amount of seventy-three thousand sixty-five US dollars (73,065\$) in principal;

Respondent is liable to pay to Claimant late payment penalties of nineteen thousand eight hundred fifty US dollars (19,850\$);

Respondent is liable to pay Claimant interest on late payments of 5% per annum on the amount of seventy-three thousand sixty-five US dollars (73,065\$) and on the amount of nineteen thousand eight hundred fifty US dollars (19,850\$), starting on the date of filing of the Request for Arbitration until the day of complete payment;

Respondent is liable to reimburse all BAT expenses and procedure costs which have been advanced by Claimants, and

Respondent shall indemnify Claimant for incurred legal expenses (including compensation for the BAT Handling Fee and attorney's fees) up to an amount to be determined in the course of the BAT proceedings.”

25. The Claimant also requests, in the alternative, as follows:

“In case the BAT would, per impossibile, not award any contractual late payment penalties, Claimant requests to be awarded jurisprudential interest on late payments on the principal amount, being 5% per annum on twenty thousand five hundred sixty-five US dollars (20,565 \$) from May 16, 2011 as well as on fifty-two thousand five hundred US dollars (52,500\$) from June 16, 2011. This interest on late payments accrues until the date of complete payment”.

4.2 Respondent's Position

26. As previously stated, despite several invitations to do so, the Club has not made any submissions in these proceedings.

5. The Jurisdiction of the BAT

27. 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 stands¹.
28. 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).
29. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
30. 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
31. The jurisdiction of the BAT over the dispute results from the arbitration clause

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.

contained under clause XIII of the Agreement, which reads 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.. The arbitrator shall decide the dispute ex aequo et bono.”

32. The foregoing arbitration agreement is in written form and thus fulfils the formal requirements of Article 178(1) PILA. Also, in accordance with Article 18.2 of the BAT Rules *“Any reference to BAT’s former name ‘FIBA Arbitral Tribunal (FAT)’ shall be understood as referring to the BAT”*.
33. 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).
34. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Player’s claims against the Club.

6. Discussion

6.1 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”.

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. The last sentence of the arbitration clause (clause XIII of the Agreement) provides that if and when any dispute is submitted to the BAT: *"The arbitrator shall decide the dispute ex aequo et bono"*.

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

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'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

40. 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"*.

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

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).

6.2 Findings

42. Despite having ample opportunity to make submissions, the Respondent did not contest the Claimant's allegations as to the facts of his claim, nor did it challenge the evidence adduced in that connection.
43. Furthermore, on their face, the content of the Agreement, the dates and contents of the three notice letters sent to the Club, as well as the latter's written declaration that it owes monies to the Player, all confirm the reality of the Claimant's allegations as to the facts. There is no indication or evidence on record that would lead the Arbitrator to conclude that the Claimant is being untruthful in any manner.
44. For the above reasons, the Arbitrator finds that the Player has established the existence of a contractual salary debt of the Club towards him of USD 73,065, corresponding to the outstanding salary payments due to him by the Club on 15 May 2011 (USD 20,565) and on 15 June 2011 (USD 52,500) under the Agreement.
45. Since there is no established contractual motive or any reason of fairness or justice for which the Player should not be entitled to claim the foregoing outstanding amount due to him under the Agreement, that sum of USD 73,065 being claimed will be awarded.
46. With respect to the contractual penalty for late payments being claimed, in the particular circumstances of this case, the Arbitrator finds it fair to award them in an amount of USD 3,000 rather than in the amount being claimed.
47. The foregoing finding is based on the following considerations:
 - The wording and structure of clause IV of the Agreement tends to indicate that, together with the Player's right to stop practicing/playing if a salary payment is more than 20 days late, the daily penalty is intended as an initial measure for the Player to obtain performance while remaining with the Club, whereas the Player's right to terminate the relationship with the Club after 30

days delay in payment and to then claim all outstanding amounts of remuneration corresponds to a second step in relation to which no daily penalty is expressly stipulated.

- When first putting the Club on notice, in June 2011, the Player claimed his outstanding salary for May 2011 together with a daily penalty for the delay (USD 2,400 for 24 days of delay) and indicated that he would not practice/play any longer until being paid, while stating that if payment was not forthcoming in 7 days he would as the next step file a request for arbitration claiming all the principal amounts owed under the Agreement with interest. With respect to the second step, no penalties were mentioned.
- Thereafter, the Player elected not to file a Request for Arbitration within 7 days and instead entered into discussions with the Club to obtain payment, during which several further notices were sent to the Club without the daily penalties being claimed and without reserving any right to them.
- Despite the Club having made several promises and not meeting its formal undertaking to pay its debt by 1 November 2011, the Player did not file a Request for Arbitration with BAT within a short period as initially indicated, but waited instead for another 7 months.
- It is fair and makes sense in light of the foregoing elements, to award the daily penalty of USD 100 for a period of 30 days, running from the date of the first late payment (15 May 2011) having given rise to a request for a penalty payment until the date on which the Player said he would be renouncing his relationship with the Club and filing a request for arbitration, i.e. 7 days beyond his letter of notice of 7 June 2011, meaning 15 June 2011.

48. Furthermore, although the 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 Agreement not specifying an interest rate, it is normal and fair that interest is due on the late payments.

49. In this case, the Arbitrator finds it appropriate to award interest at a rate of 5% per annum, in line with BAT jurisprudence.
50. It is an established principle that interest runs from the day after the date on which the principal amounts are due.
51. Consequently, the Arbitrator shall award interest for late payment on the outstanding salaries from the day after they were contractually due and on the awarded penalty from the day after the date (15 June 2011) on which the Arbitrator deems the daily penalties to have stopped running.

7. 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 18 December 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 5,150.

54. Considering that the Claimant prevailed in his claim, 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 Claimant.
55. Given that the Claimant paid advances on costs of EUR 8,026.46 as well as a non-reimbursable handling fee of EUR 2,000 (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 Articles 17.3 and 17.4 of the BAT Rules:
- (i) BAT shall reimburse EUR 2,876.46 to the Claimant, being the difference between the costs advanced by the him and the arbitration costs fixed by the BAT President;
 - (ii) The Club shall pay EUR 5,150 to the Claimant, being the difference between the costs advanced by him and the amount he is going to receive in reimbursement from the BAT;
 - (iii) The Club shall pay to the Claimant 7,500 (2,000 for the non-reimbursable fee + 5,500 for legal fees) representing the amount of his legal fees and other expenses. The total amount awarded is not exceeding the maximum compensation stipulated in Article 17.4 of the BAT Rules for cases of this value.

8. AWARD

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

- 1. BC Krasnye Krylia Samara shall pay Mr. Gerald Green Jr. an amount of USD 20,565 as compensation for unpaid salary under the Agreement, plus interest at 5% per annum on such amount from 16 May 2011 onwards.**
- 2. BC Krasnye Krylia Samara shall pay Mr. Gerald Green Jr. an amount of USD 52,500 as compensation for unpaid salary under the Agreement, plus interest at 5% per annum on such amount from 16 June 2011 onwards.**
- 3. BC Krasnye Krylia Samara shall pay Mr. Gerald Green Jr. an amount of USD 3,000 as a penalty under the Agreement, plus interest at 5% per annum on such amount from 16 June 2011 onwards.**
- 4. BC Krasnye Krylia Samara shall pay Mr. Gerald Green Jr. an amount of EUR 5,150 as reimbursement for his arbitration costs.**
- 5. BC Krasnye Krylia Samara shall pay Mr. Gerald Green Jr. an amount of EUR 7,500 for his legal fees and expenses.**
- 6. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 7 January 2013.

Quentin Byrne-Sutton
(Arbitrator)