



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0351/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Ms. Annett Rombach

in the arbitration proceedings between

Mr. Hasan Rizvić

Sport East LC

2120 Carey Ave Ste 300, Cheyenne, WY 82001, USA

- Claimant 1 -

- Claimant 2 -

vs.

KK Budućnost Voli

Njegošev park, 81000 Podgorica, Montenegro

- Respondent -

1. The Parties

1.1 The Claimants

1. Mr. Hasan Rizvić, (the “Player” or “Claimant 1”), is a professional basketball player of Slovenian nationality.
2. Sport East LC (the “Agency” or “Claimant 2” and together with Claimant 1 the “Claimants”) is an agency representing professional basketball players. It is a Limited Liability Company based in Wyoming, USA. In this arbitration, it is represented by Ms. Jasmina Trnovčević (the “Agent”), a FIBA licensed agent based in Italy.

1.2 The Respondent

3. KK Budućnost Voli (the “Club” or “Respondent”) is a professional basketball club located in Podgorica, Montenegro. The Club is not represented in the present arbitration.

2. The Arbitrator

4. On 20 December 2012, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (the “BAT”), appointed Ms. Annett Rombach as arbitrator (the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (the “BAT Rules”). None of the Parties has raised any objections to the appointment of the Arbitrator or to her declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

5. On 4 January 2012, the Player and the Club entered into an employment agreement (the “Player Contract”), pursuant to which the Club engaged the Player as a professional basketball player from 4 January 2012 to 1 June 2012. According to Clause 3 of the Player Contract, the Club undertook to pay a total salary of EUR 75,000 net, due and payable pursuant to the following schedule:

<i>“On January 31st 2012</i>	<i>15.000,00 EURO, net</i>
<i>On February 28th 2012</i>	<i>15.000,00 EURO, net</i>
<i>On March 31st 2012</i>	<i>15.000,00 EURO, net</i>
<i>On April 30th 2012</i>	<i>15.000,00 EURO, net</i>
<i>On May 31st 2012</i>	<i>15.000,00 EURO, net”</i>

6. On the same day, the Club concluded an agreement with the Agency (the “Agent Contract”), according to which the Club agreed, *inter alia*, to pay a commission of EUR 7,500 net to the Agency for services in connection with contracting the Player (the “Agent Commission”). Pursuant to Clause 2 of the Agent Contract, the Agent Commission was payable on 15 March 2012.
7. Claimants allege that Respondent has failed to pay the Player’s salary for the months of April and May 2012 in a total amount of EUR 30,000, and the Agent Commission in the amount of EUR 7,500.

3.2 The Proceedings before the BAT

8. On 5 December 2012, the Claimants filed a Request for Arbitration in accordance with the BAT Rules. The non-reimbursable handling fee of EUR 2,000 was received in the BAT bank account on the same day.

9. On 27 December 2012, the BAT informed the Parties that Ms. Annett Rombach had been appointed as Arbitrator in this matter, invited Respondent to file its Answer in accordance with Article 11.2 of the BAT Rules by no later than 17 January 2013 (the “Answer”), and fixed the amount of the Advance on Costs to be paid by the Parties by no later than 10 January 2013 as follows:

<i>“Claimant 1 (Mr Hasan Rizvić)</i>	<i>EUR 3,000</i>
<i>Claimant 2 (Sport East LC)</i>	<i>EUR 1,000</i>
<i>Respondent (KK Budocnost Voli)</i>	<i>EUR 4,000”</i>

10. By letter of 25 January 2013, the BAT Secretariat noted Respondent’s failure to submit its answer and both Claimants’ and Respondent’s failure to pay their respective shares of the Advance on Costs. The BAT Secretariat requested the Parties to effectuate the outstanding payments of the Advance on Costs by no later than 5 February 2013 to ensure that the arbitration could proceed. Respondent was granted a final opportunity to file an Answer by no later than 31 January 2013.
11. By letter of 5 February 2013, the BAT Secretariat acknowledged receipt of the Player’s and the Agency’s shares of the Advance on Costs, and 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 Claimants were requested to effect payment of the remaining share of the Advance on Costs in the amount of EUR 4,000 by no later than 15 February 2013.
12. On 8 February 2013, Claimants made the substitute payment of Respondent’s share of the Advance on Costs.
13. By letter of 14 February 2013, the BAT Secretariat acknowledged receipt of the full amount of the Advance on Costs. The Arbitrator declared the exchange of documents

completed and invited the Parties to submit a detailed account of their costs by no later than 21 February 2013.

14. On 19 February 2013, Claimants submitted the following account of costs:

*“05.12.2012. 2.000. euro non-reimbursable handling fee
29.01.2013. 4.000. euro Advance on costs (Claimants 1 and 2)
08.02.2013. 4.000 euro Advance on costs (Respondent's share)
28.11.2012. 2.500. euro Legal advising and consulting for Hasan Rizvić
28.11.2012. 1.000 euro Legal advising and consulting for Sport East LC
Total costs : 13.000 euro”*

15. On 26 February 2013, the BAT Secretariat forwarded Claimants' account of costs to the Club and invited it to comment on it by no later than 1 March 2013. No comments were filed by the Club.

16. By Procedural Order of 4 March 2013, the Arbitrator invited Claimants to explain the nature and quantum of the "Legal advising and consulting" costs submitted by them in their Account of Costs dated 19 February 2013, and to provide evidence (e.g. invoices) in support thereof, by no later than 8 March 2013.

17. In response thereto, Claimant 2, by e-mail of 6 March 2013, submitted that Claimants had sought legal advice by a lawyer in connection with the present arbitration:

“Advocate tell us that we can try to get our money by FIBA abitrage and he help us complete the template for abitrage. He also help us choose the evidence for abitrage and he sad that we need to pay non-reimbusable fee to FIBA.”

18. Upon the Arbitrator's further invitation to submit invoices or other evidence in support of Claimants' costs for retaining a lawyer (as alleged in the March 6 e-mail), Claimants chose to remain silent.

19. Respondent did not submit any comments to Claimants' cost submissions.
20. As none of the Parties requested to hold a hearing, the Arbitrator decided, in accordance with Article 13.1 of the BAT Rules, not to hold a hearing and to render the award based on the written record before her.

4. The Positions of the Parties

4.1 Claimants' Position and Request for Relief

21. Claimants submit that the Club failed to pay a portion of the Player's salary due under the Player Contract, and the entire Agent Commission owed under the Agent Contract.
22. In their Request for Arbitration, Claimants request the following relief:
 - ***“Two last salaries from the contract for Hasan Rizvić (2*15.000 eura=30.000 eura),***
 - ***agent fee (commission) for Sport East LC represent (sic) by Jasmina Trnovčević (7.500 eura),***
 - ***legal interests for these two salaries and agents fee***
 - ***cost of arbitration and non-reimbursable handling fee”¹***

4.2 Respondent's Position and Request for Relief

23. Despite several invitations by the BAT, the Club neither engaged in the arbitration proceedings at hand, nor made any submissions within the time limits set by the Arbitrator in accordance with the BAT Rules.

¹ Emphases in the original.

5. The Jurisdiction of the BAT

24. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Respondent did not participate in the arbitration, she will examine her jurisdiction *ex officio* on the basis of the record as it stands.
25. Pursuant to Art. 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).
26. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
27. The Arbitrator finds that the dispute referred to her is of a financial nature and is thus arbitrable within the meaning of Art. 177(1) PILA.
28. The jurisdiction of the BAT over the Claimants’ claims results from the (identical) arbitration clauses contained in Clause 6.2 of the Player Contract and Clause 4 of the Agent Contract. Both clauses read as follows:

“Any disputes arising from or related to the present Agreement shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved definitely 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. Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. The parties expressly waive recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sport (CAS) upon appeal, as provided in Article 192 of the Swiss Act on Private International Law. The arbitrator and CAS upon appeal shall decide the dispute “ex aequo et bono.””

29. In accordance with Article 1.1 of the BAT Rules, these rules “*shall apply whenever the parties to a dispute have agreed in writing to submit the same to the BAT – including by reference to its former name “FIBA Arbitral Tribunal (FAT)”*” (emphasis added). Article 18.2 of the BAT Rules says: “*Any reference to BAT’s former name “FIBA Arbitral Tribunal (FAT)” shall be understood as referring to the BAT.*” The Parties’ reference to the “FIBA Arbitral Tribunal (FAT)” in Clause 6.2 of the Player Contract and in Clause 4 of the Agent Contract, respectively, is therefore understood as a reference to the BAT.
30. The Agreements are in written form and thus both arbitration clauses fulfil 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 which could cast any doubt on the validity of the arbitration agreements in the present matter under Swiss law (cf. Article 178(2) PILA). In particular, the wording “[a]ny disputes arising from or related to the present Agreement” in Clause 6.2 of the Player Contract and in Clause 4 of the Agent Contract, respectively, clearly covers the present dispute.
32. Finally, the Arbitrator notes that the jurisdiction of BAT has not been contested by any party. In view of all the above, the Arbitrator, therefore, holds that she has jurisdiction to decide the present dispute.

6. Other Procedural Issues

33. Article 14.2 of the BAT Rules specifies that “*the Arbitrator may [...] 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 BAT.² However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.

34. This requirement has been met in the present case. Respondent was informed of the initiation of the proceedings and of the appointment of the Arbitrator in accordance with the relevant rules. It was also given sufficient opportunity to respond to Claimants' Request for Arbitration, to their Account on Costs and other submissions. Respondent, however, chose not to participate in this Arbitration.

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 reads 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."

² See *ex multis* BAT cases 0001/07, Ostojic and Raznatovic vs. PAOK KAE; 0018/08, Nicevic vs. Beşiktaş; 0093/09, A.S.D. Pallacanestro Femminile Schio vs. Braxton; 0170/11, Haritopoulos and Kallergis vs. Panionios BC K.A.E. and Gallis.

37. In Clause 6.2 of the Player Contract and in Clause 4 of the Agent Contract, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono* without reference to any other law. Consequently, the Arbitrator will decide the issues submitted to her in this proceeding *ex aequo et bono*.

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

8. Findings

39. Claimant 1 requests outstanding salary payments for April and May 2012 (8.1), Claimant 2 seeks payment of the Agent Commission (8.2), and both Claimants request payment of interest on their respective claims (8.3).

8.1 The Player's Salary in the Amount of EUR 30,000

40. According to the Player Contract, Claimant 1 was entitled to a total salary of EUR 75,000 net (to be paid in five equal instalments of EUR 15,000) for rendering his services as a professional basketball player from January to May 2012. Claimant 1 alleges that the Club failed to pay the salary instalments for April and May 2012 (totalling EUR 30,000). Respondent disputed neither the existence, nor the quantum of the claimed amounts before or during this arbitration. Based on the record before her, the Arbitrator finds that there is no indication that would cast doubt on the existence of the Club's obligation to pay Claimant 1 the (outstanding) salaries as stipulated under the Player Contract. The Arbitrator therefore finds that Claimant 1 is entitled to the claimed salary payment for the months of April and May 2012 in the total amount of EUR 30,000.

8.2 The Agent Commission in the Amount of EUR 7,500

41. Clause 1 of the Agent Contract sets forth that the Agency is to be paid a commission in the amount of EUR 7,500 for “services, locating and contracting the Player”. Respondent did not dispute either the existence or quantum of the Agent Commission before or during this arbitration. Because the Arbitrator has no reason to doubt the validity of Respondent’s promise to pay the Agent Commission, as provided for in the Agent Contract, she finds that Claimant 2 is entitled to the requested payment in the amount of EUR 7,500.

8.3 Interest

42. Claimants request the payment of (default) interest on their claims without reference to a specific rate or starting date.

43. Neither the Player Contract nor the Agent Contract provide for any obligation by the Club to pay interest in case of a non-payment. However, it is a generally accepted principle embodied in most legal systems and reflected in the BAT jurisprudence³ that default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest. The Arbitrator, deciding *ex aequo et bono* and in accordance with constant BAT jurisprudence, considers an interest rate of 5% per annum to be fair and just to avoid that the Club derives any profit from the non-fulfillment of its obligations.

44. With respect to the starting date, the Arbitrator finds that default interest should accrue immediately from the day after the requested payments became due under the relevant

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; 0237/11, Ivanovic, GPK Sports Management Limited vs. Kolossos Rhodes Basketball Club.

contracts. The payment due dates are explicitly set out in the relevant contracts (Clause 3 of the Player Contract and Clause 2 of the Agent Contract, respectively) so that Respondent knew at what time it was obligated to effectuate the payments. The Arbitrator, deciding *ex aequo et bono*, finds that it is just and equitable to award interest from the earliest possible day.

45. Accordingly, interest on the Player's outstanding salary accrues from 1 May 2012 (EUR 15,000 with respect to the April salary) and from 1 June 2012 (EUR 15,000 with respect to the May salary). Interest on the Agent Commission accrues from 16 March 2012.

9. 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 legal fees and expenses incurred in connection with the proceedings.
47. On 2 April 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”; 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”, and 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 5,885.
48. Considering that Claimants prevailed with all of their main claims (and only failed with their claim for the reimbursement of certain legal fees, which will be addressed shortly),

it is appropriate that all of the costs related to this arbitration be borne by Respondent and that Respondent be required to cover its own legal costs.

49. Additionally, pursuant to Articles 17.1 and 17.3 of the BAT Rules, Claimants are entitled to the handling fee, which qualifies as “other expenses” incurred in connection with the present arbitration.
50. The Arbitrator, however, will not award Claimants their “legal advising and consulting costs” in a total amount of EUR 3,500, as claimed in their Cost Account. Claimants, who were not represented by counsel in these proceedings, failed to substantiate that any such costs in connection with the preparation of this arbitration have in fact arisen. The Arbitrator has twice invited Claimants to provide invoices or other proof in support of their claim for legal fees. When Claimants seek an award for legal fees despite the fact that they were not represented by a lawyer during the arbitration, it is essential – as a minimum – that they explain their claim by identifying the lawyer who assisted them and by submitting evidence as to the time their lawyer spent on the case, including his or her fee schedule (or to provide other explanations allowing the Arbitrator to examine the claim). None of these explanations were given by Claimants. Their mere representation that some (unidentified) “advocate” assisted them with the filing of the arbitration is insufficient to allow the Arbitrator to make a ruling in Claimants’ favour.
51. In light of the foregoing and given that Claimants paid all shares of the Advance on Costs in the amount of EUR 3,000 (Claimant 1), EUR 1,000 (Claimant 2) and EUR 4,000 (Respondent), the Arbitrator decides that in application of Article 17.3 of the BAT Rules:
 - (i) BAT shall reimburse EUR 2,115 to the Claimants, being the difference of the costs advanced by them and the arbitration costs fixed by the BAT President;



BASKETBALL
ARBITRAL TRIBUNAL

- (ii) Respondent shall pay EUR 5,885 to Claimants, being the difference between the costs advanced by them and the amount to be reimbursed by the BAT.
- (iii) Furthermore, as stated above, the Arbitrator considers it appropriate to take into account the non-reimbursable handling fee when assessing the legal expenses incurred by Claimants in connection with these proceedings. Hence, the Arbitrator fixes the contribution towards the Claimants' legal expenses at EUR 2,000.

10. AWARD

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

- 1. KK Budućnost Voli is ordered to pay to Mr. Hasan Rizvić EUR 30,000 together with interest of 5% p.a.**
 - from 1 May 2012 on the amount of EUR 15,000; and
 - from 1 June 2012 on the amount of EUR 15,000.
- 2. KK Budućnost Voli is ordered to pay to Sport East LC EUR 7,500 together with interest of 5% p.a. from 16 March 2012.**
- 3. KK Budućnost Voli is ordered to pay to Mr. Hasan Rizvić and Sport East LC, jointly and severally, EUR 5,885 as a reimbursement of the Advance on Costs.**
- 4. KK Budućnost Voli is ordered to pay to Mr. Hasan Rizvić and Sport East LC, jointly and severally, EUR 2,000 as a contribution towards their legal expenses.**
- 5. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 09 April 2013

Annett Rombach
(Arbitrator)